DOCKET

No. 08-289
Vide 08-294

Title:	Thomas C. Horne, Superintendent, Arizona Public Instruction, Petitioner v. Miriam Flores, et al.
Docketed:	September 4, 2008
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(07-15603, 07-15605)
Decision Date:	February 22, 2008
Rehearing Denied:	April 17, 2008

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jul 2 2008	Application (08A20) to extend the time to file a petition for a writ of certiorari from July 16, 2008 to September 14, 2008, submitted to Justice Kennedy.
Jul 8 2008	Application (08A20) granted by Justice Kennedy extending the time to file until September 1, 2008.
Aug 29 2008	Petition for a writ of certiorari filed. (Response due October 6, 2008)
Sep 19 2008	Order extending time to file response to petition to and including November 5, 2008, for all respondents.
Oct 6 2008	Brief amicus curiae of Washington Legal Foundation filed. VIDED.
Oct 9 2008	Order further extending time to file response to petition to and including December 1, 2008, for all respondents.
Dec 1 2008	Brief of respondents Miriam Flores, et al. in opposition filed. VIDED.
Dec 1 2008	Brief of respondents Arizona, et al. in opposition filed. VIDED.
Dec 16 2008	Reply of petitioner Thomas C. Horne, Superintendent, Arizona Public Instruction filed.
Dec 17 2008	DISTRIBUTED for Conference of January 9, 2009.
Jan 9 2009	Petition GRANTED the case is consolidated with No. 08-294 and a total of one hour is allotted for oral argument. The briefs of petitioners are to be filed on or before Thursday, February 19, 2009. The briefs of respondents are to be filed on or before Wednesday, March 18, 2009. Reply briefs, if any, are to be filed in accordance with Rule 25.3 of the Rules of this Court.
Feb 19 2009	Brief of petitioner Thomas C. Horne, Superintendent, Arizona Public Instruction filed. VIDED.
Feb 19 2009	Joint appendix filed. VIDED. Statement of costs received.
Feb 19 2009	Brief of petitioners Speaker of the Arizona House of Representatives, et al. filed. VIDED.
Feb 23 2009	SET FOR ARGUMENT ON Monday, April 20, 2009.
Feb 25 2009	Brief amici curiae of American Unity Legal Defense Fund, et al. filed. VIDED.
Feb 25 2009	Brief amicus curiae of Eagle Forum Education & Legal Defense Fund, Inc. filed. VIDED.
Feb 25 2009	Brief amici curiae of Pacific Legal Foundation, et al. filed. VIDED.
Feb 26 2009	Brief amici curiae of Education-Policy Scholars filed. VIDED.
Feb 26 2009	Brief amici curiae of American Legislative Exchange Council, et al. filed. VIDED. (Distributed)
Feb 26 2009	Brief amicus curiae of Washington Legal Foundation filed. VIDED. (Distributed)
Feb 26 2009	Brief amicus curiae of Mountain States Legal Foundation filed. (Distributed)

Feb 27 2009 CIRCULATED.

Mar 11 2009 Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the respondents. VIDED.

Mar 11 2009 Record received from U.S.C.A. for 9th Circuit. (1 envelope)

Mar 16 2009 Record received from U.S.D.C. for the District of Arizona (Tucson) (2 boxes)

Mar 18 2009 Brief of respondents Miriam Flores, and Rosa Rzeslawski filed. (Distributed) VIDED.

Mar 18 2009 Brief of respondents Arizona, and Arizona State Board of Education filed. VIDED. (Distributed)

Mar 19 2009 Joint motion for divided argument filed by petitioners. VIDED.

Mar 25 2009 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED.

Mar 25 2009 Brief amici curiae of Asian American Legal Defense & Education Fund, et al. filed. VIDED. (Distributed)

Mar 25 2009 Brief amici curiae of NAACP Legal Defense and Educational Fund, Inc., et al. filed. VIDED. (Distributed)

Mar 25 2009 Brief amici curiae of Educational Policy and Finance Scholars filed. VIDED. (Distributed)

Mar 25 2009 Brief amici curiae of Tucson Unified School District, et al. filed. VIDED. (Distributed)

Mar 25 2009 Brief amici curiae of Asian American Justice Center, et al. filed. VIDED. (Distributed)

Mar 25 2009 Brief amici curiae of Civil Rights Organizations filed. VIDED. (Distributed)

Mar 25 2009 Brief amici curiae of National School Boards Association, et al. filed. VIDED. (Distributed)

Mar 25 2009 Brief amici curiae of Washington Lawyer's Committee on Civil Rights and Urban Affairs - Immigrant and Refugee Rights Project, et al. filed. VIDED. (Distributed)

Mar 25 2009 Motion for leave to file amici brief out-of-time filed by 30 Recognized Leaders of Education Research in support of neither party. VIDED. (Distributed)

Mar 25 2009 Brief amicus curiae of United States filed. VIDED. (Distributed)

Mar 31 2009 Letter from the Acting Solicitor General proposing to lodge copies of documents of the Department of Education cited to in the brief of the United States. VIDED.

Apr 1 2009 Additional record received from U.S. District Court of the District of Arizona. (1 box of transcripts)

Apr 3 2009 The Clerk has approved submission of the Acting Solicitor General's proposed lodging. VIDED.

Apr 3 2009 Motion for divided argument filed by petitioners DENIED.

Apr 3 2009 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

Apr 3 2009 Motion for leave to file amici brief filed by 30 Recognized Education Research Leaders of Education Research in support of neither party out-of-time GRANTED.

Apr 3 2009 Lodging of the Acting Solicitor General (12 copies). VIDED.

Apr 9 2009 Reply of petitioner Thomas C. Horne, Superintendent, Arizona Public Instruction filed. VIDED. (Distributed)

Apr 13 2009 Reply of petitioners Speaker of the Arizona House of Representatives, et al. filed. VIDED. (Distributed)

Apr 20 2009 Argued. For petitioners: Kenneth W. Starr, Los Angeles, Cal. For respondents: Sri Srinivasan, Washington, D.C., and Nicole A. Saharsky, Assistant to the Solicitor General,

Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

~~Name~~~~~~~~~~~~~~~~~~~~~~	~~~~~~~Address~~~~~~~~~~~~~~~~~~~	~~Phone~~~
Attorneys for Petitioner:		
Eric J. Bistrow	Burch & Cracchiolo, P.A.	(602) 274-7611
Counsel of Record	702 E. Osborn, Suite 200 Phoenix, AZ 85014 ebistrow@bcattorneys.com	
Party name: Thomas C. Horne, Superintendent, Arizona Public Instruction		
Kenneth W. Starr	Kirkland & Ellis LLP	(213) 680-8400
Counsel of Record	777 S. Figueroa Street Los Angeles, CA 90017 ken.starr@pepperdine.edu	
Party name: Speaker of the Arizona House of Representatives, et al.		
Attorneys for Respondents:		
Kimberly Anne Demarchi	Lewis & Roca LLP	(602) 262-5728
Counsel of Record	40 North Central Ave. Phoenix, AZ 85004-4429 kdemarchi@LRLaw.com	
Party name: Arizona, et al.		
Sri Srinivasan	O'Melveny & Meyers LLP	(202) 383-5300
Counsel of Record	1625 Eye Street, N.W. Washington, DC 20006 ssrinivasan@omm.com	
Party name: Miriam Flores, et al.		
Timothy M. Hogan	Arizona Center for Law in the Public Interest 202 E. McDowell Rd. Phoenix, AZ 85004 thogan@aclpi.org	(602)-258-8850
Party name: Miriam Flores, et al.		
Other:		
J. Scott Detamore	Mountain States Legal Foundation	(303) 292-2021

2596 South Lewis Way
Lakewood, CO 80227

Party name: Mountain States Legal Foundation

Steven Geoffrey Gieseler	Pacific Legal Foundation 1002 SE Monterey Commons Blvd. Suite 102 Stuart, FL 34996	(772)-781-7787

Party name: Pacific Legal Foundation, et al.

Alan Scott Gilbert	Sonnenschein Nath & Rosenthal LLP 7800 Sears Tower 233 South Wacker Drive Chicago, IL 60606-6404	(312) 876-8000

Party name: Asian American Justice Center, et al.

Dan Himmelfarb	Mayer Brown LLP 1909 K Street, N. W. Washington, DC 20006-1101 dhimmelfarb@mayerbrown.com	(202) 263-3000

Party name: Education-Policy Scholars

Neal Kumar Katyal	Acting Solicitor General Department of Justice Washington, DC 20530-0001	(202) 514-2217

Party name: United States

Patrick F. Linehan	Steptoe & Johnson LLP 1330 Connecticut Avenue, NW Washington, DC 20036 plinehan@steptoe.com	(202) 429-3000

Party name: Washington Lawyer's Committee for Civil Rights and Urban Affairs - Immigrant and Refugee Rights Project, et al.

Robert A. Long Jr.	Covington & Burling LLP 1201 Pennsylvania Avenue, N.W. Washington, DC 20004	(202) 662-5212

rlong@cov.com

Party name: Asian American Legal Defense & Education Fund, et al.

Jonathan L. Marcus	Covington & Burling, LLP 1201 Pennsylvania Avenue, NW Washington, DC 20004	(202) 662-6000

Party name: Educational Policy and Finance Scholars

Robert C. O'Brien Jr.	Arent Fox 555 West Fifth Street, Fl. 48 Los Angeles, CA 90013-1065	(213) 443-7512

Party name: American Legislative Exchange Council, et al.

John Payton	NAACP Legal Defense & Educational Fund, Inc. 99 Hudson Street, 16th Floor New York, NY 10013	(212) 965-2200

Party name: NAACP Legal Defense and Educational Fund Inc., et al.

Nina Perales	Mexican American Legal Defense and Educational Fund 110 Broadway, Suite 300 San Antonio, TX 78205 nperales@maldef.org	(210) 224-5476

Party name: Civil Rights Organizations

A.W. Phinney	Mintz Levin Cohn Ferris Glovsky and Popeo PC One Financial Center Boston, MA 02111	(617) 842-6000

Party name: 30 Recognized Education Research Leaders of Education Research in support of neither party out of time

John C. Richardson	DeConcini McDonald Yetwin & Lacy PC 2525 East Broadway Boulevard, Suite 200 Tucson, AZ 85716	(520) 322-5000

Party name: Tucson Unified School District, et al.

Nicole A. Saharsky	Assistant to the Solicitor General	(202)-514-2201

950 Pennsylvania Ave., NW
Department of Justice
Washington, DC 20530

Party name: Thomas C. Horne, Superintendent, Arizona Public Instruction v. Miriam Flores, et al.

Gene C. Schaerr	Winston & Strawn LLP 1700 K Street, N.W. Washington, DC 20006-3817	(202) 282-5000

Party name: Washington Legal Foundation

Andrew L. Schlafly	939 Old Chester Road Far Hills, NJ 07931	(908) 719-8608

Party name: Eagle Forum Educational & Legal Defense Fund, Inc.

Maree F. Sneed	Hogan & Hartson LLP 555 Thirteenth Street, N.W. Washington, DC 20004	(202) 637-6416

Party name: National School Boards Association, et al.

Barnaby W. Zall	Weinberg & Jacobs LLP 11300 Rockville Pike #1200 Rockville, MD 20852	(301) 468-5500

Party name: American Unity Legal Defense Fund, et al.

PETITION FOR WRIT OF CERTIORARI

102

(1)

Supreme Court, U.S.
FILED

No. 08-289

AUG 29 2008

OFFICE OF THE CLERK
William K. Suter, Clerk

In The
Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF ARIZONA,

Petitioner,

v.

MIRIAM FLORES, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

ERIC J. BISTROW,
Counsel of Record
DARYL MANHART
MICHAEL S. DULBERG
MELISSA G. IYER
BURCH & CRACCHIOLO, P.A.
702 E. Osborn, Suite 200
Phoenix, Arizona 85014
phone: 602-274-7611
fax: 602-234-0341

Attorneys for Petitioner Superintendent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. By interpreting the phrase "appropriate action" under Section 1703(f) of the Equal Education Opportunity Act as a requirement that the State of Arizona provide for a minimum amount of funding specifically allocated for English Language Learner programs statewide, did the Ninth Circuit violate the doctrine prohibiting federal courts from usurping the discretionary power of state governments to determine how to appropriately manage and fund their public education systems?

2. Should the phrase "appropriate action" as used in Section 1703(f) of the Equal Education Opportunity Act be interpreted consistently with the No Child Left Behind Act of 2001, where both Acts have the same purpose with respect to English Language Learners and the NCLB provides specific standards for the implementation of adequate English Language Learner programs, but the EEOA does not?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
1. The Original 2000 Order	3
2. The Sanction Orders and First Appeal	4
3. The Evidentiary Record Following Remand of the First Appeal	5
4. The Ninth Circuit Exceeded Its Powers	7
REASONS FOR GRANTING THE PETITION	8
I. Certiorari Is Needed to Correct the Ninth Circuit's Misinterpretation of § 1703(f) as Requiring the State to Enact Legislation and Create an Earmarked Funding Source for ELL Programs when Other Less Intrusive Actions Cured the Original Violation	8
II. This Court's Review Is Also Needed to Clarify that State Compliance with the Detailed Program Requirements of the No Child Left Behind Act Requires a Finding that the State Has Complied with the Vague Requirements of § 1703(f) of the EEOA	22
CONCLUSION	32

TABLE OF CONTENTS – Continued

Page

APPENDIX

Ninth Circuit Opinion dated February 22, 2008....App. 1

District Court Opinion dated March 22, 2007 ....App. 93

Ninth Circuit Memorandum Decision (First Appeal) dated August 23, 2006.....App. 116

District Court Order re HB 2064 dated April 26, 2006 .....App. 121

District Court Order (Sanctions) dated December 15, 2005 .....App. 133

District Court Order dated January 24, 2000....App. 154

Ninth Circuit Order re Denial Rehearing En Banc dated April 17, 2008 .....App. 192

Statutory Provisions.....App. 196

Exhibits 218 and 220 from January 2007 Evidentiary Hearings re Rule 60(b)(5).....App. 308

TABLE OF AUTHORITIES

Page

CASES

Agostini v. Felton, 521 U.S. 203 (1997) 31

Bellevue Manor Assocs. v. United States, 165 F.3d 1249 (9th Cir. 1999) 31, 32

Bd. of Educ. of Oklahoma City Public Schools v. Dowell, 498 U.S. 237 (1991) 11, 31

Busic v. United States, 446 U.S. 398 (1980) 30

Castañeda v. Pickard, 648 F.2d 989 (5th Cir. 1981) ..... *passim*

Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977) 21

Evans v. Buchanan, 555 F.2d 373 (3d Cir. 1977) 15

Firstar Bank, N.A. v. Faul, 253 F.3d 982 (7th Cir. 2001) 31

Great Northern R. Co. v. United States, 315 U.S. 262 (1942) 30

Guadalupe Organization, Inc. v. Tempe Elem. School Dist. No. 3, 587 F.2d 1022 (9th Cir. 1978) 23, 30

Honig v. Doe, 484 U.S. 305 (1988) 9

Keyes v. School Dist. No. 1, Denver, Colo., 576 F. Supp. 1503 (D. Colo. 1983) 13, 15, 22, 24

Milliken v. Bradley, 418 U.S. 717 (1974) 10

Milliken v. Bradley, 433 U.S. 267 (1977) 12

Missouri v. Jenkins, 495 U.S. 33 (1990) 10

TABLE OF AUTHORITIES – Continued

Page

Missouri v. Jenkins, 515 U.S. 70 (1995) .....*passim*

Preiser v. Rodriguez, 411 U.S. 475 (1973).....30

Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992).....11, 31

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) 10, 21

Spallone v. United States, 493 U.S. 265 (1990).....11

Stanley v. Darlington County School District, 84 F.3d 707 (4th Cir. 1996) 22

State v. Oregon Short Line R. Co., 617 F. Supp. 207 (D. Idaho 1985).....30

Teresa P. by T.P. v. Berkeley Unified School Dist., 724 F. Supp. 698 (N.D. Cal. 1989) 24

United States v. Texas, 680 F.2d 356 (5th Cir. 1982).....6

Valencia Co. v. Wilson, 12 F. Supp. 2d 1007 (N.D. Cal. 1998), *aff'd*, 307 F.3d 1036 (9th Cir. 2002).....24

FEDERAL STATUTES

20 U.S.C. § 1703(f).....*passim*

20 U.S.C. § 1712 19

20 U.S.C. § 6801 .....2, 24

20 U.S.C. § 6812(1).....25

20 U.S.C. § 6823(b).....26

TABLE OF AUTHORITIES – Continued

Page

20 U.S.C. § 6823(c) 26
20 U.S.C. § 6826(a) 26
20 U.S.C. § 6826(b) 26
20 U.S.C. § 6826(c) 26
20 U.S.C. § 6826(d) 26
28 U.S.C. § 1254(1) 2

STATE STATUTES

Ala. Code § 16-613-3 (1995) 9
Alaska Stat. § 14.17.420 (1998) 9
Arizona House Bill 2064 7
Ark. Code Ann. § 6-2-2305 (2003) 9
Colo. Rev. Stat. 22-24-104(4)(c)(I)-(II) (1998) 9
Conn. Gen. Stat. § 10-17g (1977) 9
Del. Code Ann. tit. 14, § 1716(g) (1978) 9
Fla. Stat. § 1011.62 (2002) 9
Ga. Code Ann. § 20-2-161 (1985) 9
Haw Rev. Stat. § 302A-1303.6 (2004) 9
105 Ill. Comp. Stat. 5/14C-12 (2005) 9
Ind. Code § 20-30-9-1-13 (2005) 9
Iowa Code § 280.4 (1974) 9
Kan. Stat. Ann. § 72-9509 (1979) 9
703 Ky. Admin. Regs. 5:001 (2004) 9

TABLE OF AUTHORITIES – Continued

Page

Md. Code Ann., Educ. § 5-208 (2002) 9

Me. Rev. Stat. Ann. tit. 20-A, § 15671 (2001) 9

Mo. Rev. Stat. § 163.011 (1963) 9

N.D. Cent. Code § 15.1-27-03.1 (2007) 9

N.H. Rev. Stat. Ann. § 198:40-b(I)(d) (2005) 9

N.M. Stat. § 22-8-22 (1974) 9

Neb. Rev. Stat. § 79-1007.08(2) (2006) 9

Okla. Stat tit. 70, § 18-201.1(B)(1) (1996) 9

Or. Rev. Stat. § 327.013(7)(a)(B) (1991) 9

Tex. Educ. Code Ann. § 42.153(a) (Vernon 1995) 9

Vt. Stat. Ann. tit. 16, § 4010(e) (1997) 9

Wash. Rev. Code § 28A.180.080 (2006) 9

FEDERAL RULES

Supreme Court Rule 14.1(f) 3

Federal Rule of Civil Procedure 60(b)(5) 1, 4, 7, 31, 32

Thomas C. Horne, Superintendent of Public Instruction of the State of Arizona (the "Superintendent") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, filed February 22, 2008, is published at 516 F.3d 1140, and is reprinted in the Appendix at 1-92.[1] An earlier Memorandum Decision of the United States Court of Appeals for the Ninth Circuit filed August 23, 2006, is reprinted in the Appendix at 116-120. The order of the United States District Court for the District of Arizona, issued March 22, 2007, is published at 480 F. Supp. 2d 1157, and is reprinted in the Appendix at 93-115. The original judgment from which the Petitioner sought Rule 60(b)(5) relief was issued on January 24, 2000

[1] "App." refers to the Appendix. "CR" refers to record items as enumerated on the District Court's docket sheet. All references to the transcript of the evidentiary hearing that took place in January 2007 are cited as follows: Tr., Day ___, p. ___. The days of the hearing transcript are as follows: Day 1 – January 9, 2007; Day 2 – January 10, 2007; Day 3 – January 11, 2007; Day 4 – January 12, 2007; Day 5 – January 17, 2007; Day 6 – January 18, 2007; Day 7 – January 24, 2007; Day 8 – January 25, 2007. "TE" refers to Trial Exhibit and is followed by the exhibit number.

and is published at 172 F. Supp. 2d 1225, and is reprinted in the Appendix at 154-191.

JURISDICTION

The Ninth Circuit filed its decision on February 22, 2008, and entered an order denying Petitioner's motion for panel rehearing and alternative motion for rehearing *en banc* on April 17, 2008. On July 8, 2008, this Court granted an extension to file this Petition on or before September 1, 2008. Pursuant to 28 U.S.C. § 1254(1), the Court has jurisdiction to review the decision of the circuit court on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

The Equal Education Opportunity Act of 1974 ("EEOA"), 20 U.S.C. § 1703(f) states:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . .
>
> (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

The provisions of the No Child Left Behind Act ("NCLB"), 20 U.S.C. § 6801, *et seq.*, are extremely

lengthy and, therefore, set out in the Appendix at 196-261, pursuant to Supreme Court Rule 14.1(f).

STATEMENT OF THE CASE

1. The Original 2000 Order

Plaintiffs instituted a class action lawsuit against Defendants (including Petitioner Superintendent) for failing to provide English Language Learners ("ELL") students of the Nogales Unified School District ("NUSD") with a program reasonably calculated to teach them English, in violation of § 1703(f) of the EEOA.[2]

The District Court declared in January 2000 ("original 2000 order") that Arizona's system for financing education at that time, which involved base level funding for all students and additional so-called Group "B" weight funding for ELL and other types of students,[3] was arbitrary and had led to a series of ELL deficiencies such as large classes, unqualified

[2] The class was defined as all minority at risk and ELL students "now or hereafter enrolled in the Nogales Unified School District ('NUSD') as well as their parents and guardians." (CR 105).

[3] As explained in the original 2000 order, a Group "B" weight increases the base funding by the State by weighing various factors such as type of student, experience of teaching staff, and size of school district. In 2000, the Group "B" weight for ELL students was $156.00. By 2006, it was $349.00. (TE 225, p. 8).

teachers, and insufficient educational materials. App. at 187. In the language of the statute, the District Court concluded that Arizona violated the EEOA because Arizona had not taken "appropriate action to remedy language barriers in NUSD" and had "failed to follow through with practices, resources and personnel necessary to transform theory into reality." App. at 188.

2. The Sanction Orders and First Appeal

A series of remedial orders followed the original 2000 order. The gist of those orders instructed Arizona to "rationally fund" its ELL programs. (CR 209, 226, 257).

In December 2005, the District Court imposed a graduated sanction payment against the State that leveled off at $2,000,000.00 per day until and unless the legislature failed to pass a law that "appropriately funded ELL programs." App. at 152. The Superintendent appealed the order. In March 2006, the Superintendent and Legislative Intervenor-Defendants also filed Rule 60(b)(5), Federal Rules of Civil Procedure, motions to have the original 2000 order declared satisfied. The motions were denied on April 26, 2006, and appeals were taken from those denials. App. at 121-132. All of those appeals were consolidated (the "First Appeal") and the Ninth Circuit issued a decision on August 23, 2006, in which the sanction orders of the District Court were vacated.

The Ninth Circuit remanded the First Appeal, stating:

> In light of the changes in education programs and funding since the original 2000 order, the district court should have held an evidentiary hearing and made findings of fact regarding whether changed circumstances required modification of the original court order or otherwise had a bearing on the appropriate remedy.

App. at 120.

3. The Evidentiary Record Following Remand of the First Appeal

Following the order of remand, an evidentiary hearing occurred in January 2007. The uncontradicted evidence demonstrated that a confluence of factors occurring since the original 2000 order operated to upend virtually every finding of fact previously adopted by the District Court. In the ensuing years, there had been large infusions of new money for education resulting from state voter initiatives, state legislative action, local overrides, and federal funding. (TE 225, 226, 227, 228, 229, 230, 231, 232, 240, 244, and 246). NCLB, enacted in 2001, made ELL students a core constituency of that Act, and state compliance with detailed federal program requirements a prerequisite for federal funding. App. at 196. State-funded Group "B" weight money for ELL students doubled. (TE 225, p. 8). State oversight and technical assistance for school district ELL

programs, virtually non-existent in 2000, became a driving force for ELL education. (TE 202, 203, 204, 206, 207, 209; Tr. Day 1, p. 63-68, 70-76). In addition, Arizona voters enacted Proposition 203, which eliminated bilingual education (the methodology used at NUSD in 2000 and upon which the original 2000 order was based) and mandated Structured English Immersion ("SEI") strategies.[4] App. at 280-285. Finally, immediately after the original 2000 order, NUSD hired a new district superintendent, Kelt Cooper, who instituted new, effective management techniques. (Tr. Day 3, pp. 201-213, 216-218, Day 4, pp. 7-8, 15-46, 64-66). His actions coupled with larger and current funding levels led to an invigorated program of ELL education with significantly lower class sizes, qualified teachers, an abundance of teaching materials, tutoring, and intervention strategies. (TE 206, 213, 214, 225, p. 7; Tr. Day 1, pp. 57-60; Tr. Day 1, pp. 163-169, 174, 181; Tr. Day 3, pp. 201-213, 222; Tr. Day 4, pp. 5-8, 62-63). The record was unrefuted that by 2006, the deleterious conditions at NUSD at the time of the original 2000 order had been cured, and that there were sufficient monies to operate an effective ELL program at NUSD. Indeed, every expert, including Plaintiffs' own witness, testified that by 2006, NUSD conducted effective ELL programs and met the requirements of § 1703(f). (Tr.

---

[4] *See United States v. Texas*, 680 F.2d 356, 372 (5th Cir. 1982) (district court erred in denying post-trial motion to vacate injunctive relief where state legislature subsequently enacted substitute language program act).

Day 1, pp. 96-99, 113-114, 192; Tr. Day 3, p. 180; Tr. Day 4, p. 67; Tr. Day 5, p. 134).

Nevertheless, both the District Court and the Ninth Circuit eschewed these changes and denied Rule 60(b)(5) relief. The District Court, while noting that both Arizona and NUSD made substantial strides in delivering ELL programs, focused solely on the propriety of a recently enacted statute that provided a mechanism for additional funding for ELL programs, Arizona House Bill 2064.[5] On appeal, the Ninth Circuit affirmed the District Court and, rather than determining whether NUSD had "take[n] appropriate action to overcome language barriers" (the performance requirement of the EEOA § 1703(f)), instead defined compliance in terms of whether Arizona's entire school funding scheme specifically earmarked sufficient monies (a requirement not imposed by the EEOA) to cover the incremental costs of ELL programs.[6] App. at 40-45, 46-48, 62-64, 68-72.

4. The Ninth Circuit Exceeded Its Powers

The gravamen of the Superintendent's Petition is that the Ninth Circuit mandated special state-wide funding legislation to benefit ELL learners to redress

---

[5] HB 2064 was enacted in the face of the fines imposed by the District Court, which rose to $2,000,000.00 per day.

[6] Incremental costs are those ELL costs that are in addition to those costs for conducting programs for English proficient students.

a violation of EEOA § 1703(f), notwithstanding undisputed evidence that NUSD, the only subject school district, cured its ELL deficiencies at current funding levels. The Ninth Circuit fixated on this sole remedy regardless of the fact that the deleterious conditions noted in the original 2000 order no longer existed and the remedy was unnecessary and not within the scope of the EEOA. It fixated on this remedy even though substantial general funding increases that benefited all students, together with good management techniques, provided ELL students with a reasonable opportunity to learn English and advance academically. The goal of § 1703(f) is effective ELL programs. The Ninth Circuit lost sight of this goal.

REASONS FOR GRANTING THE PETITION

I. Certiorari Is Needed to Correct the Ninth Circuit's Misinterpretation of § 1703(f) as Requiring the State to Enact Legislation and Create an Earmarked Funding Source for ELL Programs when Other Less Intrusive Actions Cured the Original Violation.

This case raises far-reaching national concerns. There are seventeen states that have similar funding schemes to Arizona's.[7] Based on the Ninth Circuit's

[7] In addition to Arizona, the following seventeen states also provide base level funding for all students, including ELL students, plus a weighted formula that provides additional sums exclusively for ELL students: Alaska [Alaska Stat. § 14.17.420

(Continued on following page)

ruling, Arizona and these other jurisdictions may be required by the federal judiciary to enact grossly expensive earmarked funding mechanisms for ELL students that are unnecessary and disconnected to a violation of federal law.

Education is "perhaps the most important function of state and local governments." *Honig v. Doe*, 484 U.S. 305, 309 (1988) (quoting *Brown v. Board of Education*, 347 U.S. 483, 493 (1954)). In particular, "no matter has been more consistently placed upon the shoulders of local government than that of financing

---

(1998)]; Florida [Fla. Stat. § 1011.62 (2002)]; Georgia [Ga. Code Ann. § 20-2-161 (1985)]; Hawaii [Haw Rev. Stat. § 302A-1303.6 (2004)]; Iowa [Iowa Code § 280.4 (1974)]; Kansas [Kan. Stat. Ann. § 72-9509 (1979)]; Kentucky [703 Ky. Admin. Regs. 5:001 (2004)]; Maine [Me. Rev. Stat. Ann. tit. 20-A, § 15671 (2001)]; Maryland, [Md. Code Ann., Educ. § 5-208 (2002)]; Missouri [Mo. Rev. Stat. § 163.011 (1963)]; Nebraska [Neb. Rev. Stat. § 79-1007.08(2) (2006)]; New Mexico [N.M. Stat. § 22-8-22 (1974)]; North Dakota [N.D. Cent. Code § 15.1-27-03.1 (2007)]; Oklahoma [Okla. Stat tit. 70, § 18-201.1(B)(1) (1996)]; Oregon [Or. Rev. Stat. § 327.013(7)(a)(B) (1991)]; Texas [Tex. Educ. Code Ann. § 42.153(a) (Vernon 1995)]; and Vermont [Vt. Stat. Ann. tit. 16, § 4010(e) (1997)].

Further, there are at least seven additional states that provide specific sums for ELL students in addition to basic state aid. These states are: Alabama [Ala. Code § 16-613-3 (1995)]; Arkansas [Ark. Code Ann. § 6-2-2305 (2003)]; Colorado [Colo. Rev. Stat. 22-24-104(4)(c)(I)-(II) (1998)]; Connecticut [Conn. Gen. Stat. § 10-17g (1977)]; Delaware [Del. Code Ann. tit. 14, § 1716(g) (1978)]; Illinois [105 Ill. Comp. Stat. 5/14C-12 (2005)]; Indiana [Ind. Code § 20-30-9-1-13 (2005)]; New Hampshire [N.H. Rev. Stat. Ann. § 198:40-b(I)(d) (2005)]; and Washington [Wash. Rev. Code § 28A.180.080 (2006)].

public schools." *Missouri v. Jenkins*, 495 U.S. 33, 51-52 (1990). "The very complexity of the problems of financing and managing a . . . public school system suggests that 'there will be more than one constitutionally permissible method of solving them,' and that . . . 'the legislature's efforts to tackle the problems' should be entitled to respect." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 42 (1973) (quoting *Jefferson v. Hackney*, 406 U.S. 535, 546-547 (1972)). The Ninth Circuit ignored these deeply rooted principles.

In ruling that Arizona must enact legislation and create an earmarked funding source to fund the "incremental costs" of ELL education, the Ninth Circuit not only misconstrued the requirements of § 1703(f), but also refused to allow the State to show that the purpose of the statute was fulfilled with less intrusive actions. Section 1703(f) is not a funding statute. It is a performance statute. The Ninth Circuit's decision to compel Arizona to adopt special funding legislation to benefit ELL students without even considering the impact, effectiveness, or need for such funding is an overreaching remedy infringing upon the State's right to regulate its schools[8] and warranting this Court's intervention.

---

[8] "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." *Milliken v. Bradley*, 418

(Continued on following page)

In *Spallone v. United States*, 493 U.S. 265, 272 (1990), this Court struck down a regimen of steep fines against members of a City Council because the District Court failed to "exercise the least possible power adequate to the end proposed." In *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237 (1991), this Court affirmed the proposition that when a constitutional violation has been rectified, judicial oversight should end. Once again, in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), this Court reversed a district court's refusal to modify a consent decree to allow double bunking in jail cells. It admonished the lower court to be flexible in tailoring modifications to consent decrees in institutional reform litigation and to be mindful of financial constraints in devising a remedy. These cases underscore the need for district courts to exercise restraint, respect the allocation of powers within the federal system, and show deference for local and state governments, which bear the primary responsibility of assessing, solving, and dealing with problems of institutional reform.

Missouri v. Jenkins, 515 U.S. 70 (1995), provides another example of a comprehensive judicial remedy

---

U.S. 717, 741-42 (1974) (*Milliken I*). "[O]ur cases recognize that local autonomy of school districts is a vital national tradition, and that a district court must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution." *Missouri v. Jenkins*, 515 U.S. 70, 99 (1995) (citations omitted).

that failed to directly relate to the original constitutional violation of *de jure* segregation. This Court rejected the district court's imposition of various inter-district remedies intended to attract "white students" from the suburbs to desegregate an urban school district. It found that this remedy lacked a sufficient nexus to the intra-district violation. In so doing, this Court reaffirmed the three-part framework from *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*), to guide district courts in devising desegregation remedies. That framework established that a judicial remedy must (1) be determined by the nature and scope of the violation of federal law, *i.e.*, the remedy must be directly related to the violation; (2) be remedial in practice; and (3) take into account the interests of state and local authorities in managing their own affairs. *Missouri v. Jenkins,* embraces the principle that a remedy must be sufficiently tailored to cure the violation.

Justice Thomas, in his concurring opinion, raised deep concern about the "extravagant uses of judicial power" and elaborated on the third prong of the *Milliken II* framework:

> Federal judges cannot make the fundamentally political decisions as to which priorities are to receive funds and staff, which educational goals are to be sought, and which values are to be taught. When federal judges undertake such local, day-to-day tasks, they detract from the independent dignity of the

> federal courts and intrude into areas in which they have little expertise.
>
> . . . .
>
> But I believe that we must impose more precise standards and guidelines on the federal equitable power, not only to restore predictability to the law and reduce judicial discretion, but also to ensure that constitutional remedies are actually targeted toward those who have been injured.

515 U.S. at 133.

The decision of the Ninth Circuit flies in the face of the foregoing principles of judicial restraint. First, the Ninth Circuit usurped the power of the State government and ordered it to provide a special stream of income for ELL students without identifying existing problems with NUSD's ELL program, which that stream of income was purportedly intended to fix. Essentially, it ordered the State to appropriate funds without specifying the need or end use of those funds.[9] Second, the Ninth Circuit refused

---

[9] "It is beyond the competence of the courts to determine appropriate measurements of academic achievement and there is damage to the fabric of federalism when national courts dictate the use of any component of the educational process in schools governed by elected officers of local government." *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 576 F. Supp. 1503, 1518 (D. Colo. 1983).

> Congress, in describing the remedial obligation it sought to impose on the states in the EEOA, did not specify that a state must provide a program of bilingual education to all limited English speaking students.

(Continued on following page)

to recognize that other sources of income, better management, and reallocation of resources and priorities were all that was necessary to provide effective ELL programs (and in fact had occurred). Finally, the Ninth Circuit, in requiring a special stream of income to cover the incremental costs of ELL education, made this decision in a vacuum without knowing what was actually needed to ensure a viable ELL program. Instead of weighing these critical factors, the Ninth Circuit usurped the legislative functions of the State and refused to be deferential to those who are politically accountable to the voters.

The District Court in 2000 was dealing with a different era when it came to State funding. There have been significant infusions of State money since 2000. Uncontroverted evidence demonstrated that monies from State, county, and local sources increased the NUSD maintenance and operations budget from $21,588,806.00 in 2000 to $29,129,092.00 in 2006, while the number of students at NUSD slightly decreased during that time frame. This general funding increase most certainly enabled

---

> We think Congress' use of the less specific term, "appropriate action," rather than "bilingual education," indicates that Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations under the EEOA.

Castaneda v. Pickard, 648 F.2d 989, 1009 (5th Cir. 1981).

NUSD to lower class sizes, hire better teachers, and implement remedial, tutoring, and intervention programs for ELL students.[10] (TE 229, 246). The Ninth Circuit refused to consider that general funding increases benefited all students, including ELL students. The Ninth Circuit overstepped its judicial authority by insisting on a separate funding source (rather than confining its scrutiny to the EEOA requirement of "appropriate action") when current funding is sufficient to operate an effective ELL program.[11] NUSD did not need any earmarked money

---

[10] Indeed, the Ninth Circuit ignored the inconvenient fact that the Scottsdale Unified School District spends substantially more money than NUSD for its ELL students, maintains an incredible class size ratio of 10:1, yet Scottsdale's ELL 10th graders score worse on Arizona's AIMS academic achievement tests than NUSD's ELL 10th graders. (TE 12; TE 7, p. 3; TE 219; TE 245; Tr. Day 6, p. 12). Such facts drive home the point that requiring Arizona to provide a dedicated stream of income is not the critical factor in determining positive outcomes for ELL students. What is critical is effective school management and good ELL programs. "The law does not require perfection." *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 576 F. Supp. 1503, 1519 (D. Colo. 1983).

[11] While the unique character of every school system has prevented the Supreme Court from promulgating detailed rules concerning what a court must do to remedy a constitutional violation, the Supreme Court has specified what a court may not do in such a case. *A court is not at liberty to issue orders merely because it believes they will produce a result which the court finds desirable.* The existence of a constitutional violation does not authorize a court to seek to bring about conditions that never would have existed even if there had been no constitutional violation. . . .

(Continued on following page)

to eliminate the deleterious conditions that previously existed.

The Ninth Circuit minimized uncontradicted testimony that NUSD now conducts an effective ELL program and that the adverse conditions described in the original 2000 order no longer exist. The Ninth Circuit did so by evaluating the performance of ELL students on Arizona's "AIMS" academic achievement tests in comparison to their English-speaking counterparts, and determined that the NUSD's progress is limited because ELL students lag behind *all* students in terms of ELL scores on AIMS. Reliance on such tests scores to measure the effectiveness of an ELL program is misplaced and inappropriate. AIMS tests are given in English. ELL students are not yet proficient in English. When they achieve English proficiency, they cease being ELL students. It is self-evident that ELL students would not do well on AIMS and certainly would significantly lag behind those who are literate in English. Further, using such test scores as a touchstone for success can be quite misleading. The District Court, in its original 2000 order, acknowledged that low test scores for ELL

> *The task of a remedial decree in a school desegregation case is simply to correct the constitutional violation and to eradicate its effects.* "As with any equity case, the nature of the violation determines the scope of the remedy." *Swann v. Board of Education, supra,* 402 U.S. at 16, 91 S.Ct. at 1276.

Evans v. Buchanan, 555 F.2d 373, 379-80 (3d Cir. 1977) (emphasis added).

students could be due to socio-economic and other factors. App. at 189-190. This court, in *Missouri v. Jenkins*, rejected the notion that scoring below "national norms" on tests should be a factor in deciding whether a school district achieved partial unitary status unless the constitutional violation caused low test scores. 515 U.S. at 101-102. Here, there has never been a showing that money had any connection with low ELL scores on AIMS tests.

The Ninth Circuit's flawed focus on test scores is matched by its striking failure to discuss the achievements of NUSD on its annual measurement achievement objectives ("AMAO"), NCLB's accountability standards for ELL students.[12] NUSD's ELL students met those standards in every category, which means that sufficient numbers of ELL students not only made appropriate progress in learning English, but also became proficient. App. at 312. This is a far more relevant measure of effective ELL programs than how well non-English speaking students score on achievement tests given in English.

---

[12] NCLB was enacted after the original 2000 order and includes more specific ELL compliance requirements that were lacking with the EEOA. NCLB imposes comprehensive programming and accountability requirements on states so that ELL students learn English. As urged in the second argument herein, it is illogical to contend that Arizona simultaneously meets NCLB's detailed requirements to provide effective ELL programs and be accountable for the progress of ELL students and yet fails to satisfy EEOA § 1703(f)'s vague requirement that it take "appropriate action."

This Court admonished in *Missouri v. Jenkins*, that remedies must be narrowly tailored to cure the conditions that violate federal law. 515 U.S. at 88. To do that, there needs to be a clear understanding of the conditions that require correction. Further, to assure that the remedy is narrow, it is critical to devise the least intrusive means to solve the identified problems. The Ninth Circuit failed to even identify any problems at NUSD[13] that continue to violate

---

[13] In an attempt to diminish the success of NUSD's program for ELL students, the Ninth Circuit referred to testimony of Dr. Guillermo Zamudio, Cooper's successor as NUSD superintendent. Zamudio complained that NUSD relied on "long-term substitutes" and "emergency certified teachers," and stated that it was difficult to recruit fully qualified teachers because starting salaries in NUSD lagged behind the statewide average. Finally, Zamudio testified that he would like to reduce ELL class ratios to 15:1. No nexus was ever drawn between these complaints and the ineffectiveness or effectiveness of the ELL program. There was no testimony that "substitute" or "emergency certified" teachers could not provide effective ELL instruction. There was no testimony that difficulties in hiring new teachers caused a deleterious impact on ELL programs. Finally, no one ever indicated that a school district needed to reduce its classroom ratios of ELL students to 15:1 to have an effective program. Indeed, there was testimony that such ratios were not only unnecessary, but far outside national norms. Zamudio's complaints were nothing more than a wish list. Similar wish lists could be obtained from any superintendent of any school district in the United States. Neither the Ninth Circuit nor the District Court weighed alternatives to the imposition of earmarked funding. There was evidence in the record that NUSD's teacher salaries overall were at the state average and that substantial cost savings could be obtained by ending wasteful programs. Yet, changing some of the priorities of the school district and utilizing more efficient management of limited resources were

(Continued on following page)

federal law and compounded that failure by refusing to weigh less intrusive remedies.[14]

The reason that the Ninth Circuit failed to identify remaining deficiencies in the ELL program that violated federal law is that those prior deficiencies were cured. Every expert who opined on the condition of NUSD's ELL program found it to be effective and in compliance with § 1703(f). Even Plaintiffs' own witness, Dr. Zamudio, testified to current compliance with § 1703(f). He stated:

> Q. With your current ELL program, it is an effective program but it can become better? Have I said that right?
>
> A. Yes sir.
>
> . . . .
>
> Q. Your district currently meets federal requirements relative to English language learners, correct?

---

foreclosed by the lower courts' imposition of an earmarked funding requirement that is not authorized by the EEOA.

[14] "In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court, department, or agency of the United States shall seek or impose *only such remedies as are essential to correct* particular denials of equal educational opportunity or equal protection of the laws." 20 U.S.C. § 1712 (emphasis added) (this is the remedial provision of the EEOA).

A. To my knowledge, we make every assurance that we meet the requirements set forth.

(Tr. Day 6, pp. 84, 98).

The Ninth Circuit provided no evaluation of the need or benefits that would result from earmarked funding because the problems noted in the original 2000 order had been solved. It mandated an infusion of earmarked funding that was completely unfettered to any violation of § 1703(f). As previously noted, the Ninth Circuit ignored the fact that § 1703(f) is not a funding statute, but is a performance statute. If a state through its funding system, oversight, and technical assistance ensures that NUSD's students have a reasonable opportunity to learn English, no more is required. Respect for federalism should have caused the Ninth Circuit to measure the need and effectiveness of the remedy before it usurped the ability of the State to manage its own affairs.

The ruling of the Ninth Circuit constitutes excessive interference with the operations of State government.[15] Arizona's funding scheme ensures that

---

[15] The EEOA § 1703(f) term "appropriate action" is not defined and no legislative history gives these words context or definition. When the original 2000 order was issued, the District Court relied on *Castañeda v. Pickard*, 648 F.2d 989 (5th Cir. 1981). The *Castañeda* court, in the absence of any legislative guidelines, judicially crafted a three-part test as a framework to evaluate "appropriate action." In doing so, the *Castañeda* court stated that its intention was to "fulfill the responsibility Congress has assigned to [the courts] without unduly substituting

(Continued on following page)

school districts receive a certain level of general or base funding for all students plus Group "B" weight funding for students with special needs such as ELL students. The Ninth Circuit has ruled that in light of this system, all incremental costs of ELL students must be paid from an earmarked stream of income, regardless of whether an underlying violation of EEOA § 1703(f) has previously been remedied by increases in general funding, State oversight, and effective management and leadership efforts at the local level. According to the Ninth Circuit, ELL costs and funding must be viewed in isolation without reference to any other resources.

The State of Arizona and its local school districts are in a far better position to assess and solve ELL problems, establish priorities, and determine what combination of funding, programs, and leadership is needed to deal with the complicated issue of overcoming language deficiencies.[16] If the State can cure a

---

our educational values and theories for the educational and political decisions reserved to state or local school authorities or the expert knowledge of educators." *Id.* at 1009.

[16] In the context of school desegregation, this Court has emphasized that "local autonomy of school districts is a vital national tradition." *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977). "The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States." *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 58 (1973). "It would be an unfathomable intrusion into a state's affairs – and a violation of the most basic notions of federalism – for a federal court to determine the allocation of a

(Continued on following page)

§ 1703(f) violation with significant general funding and Group "B" weight increases, better programming and oversight, and good leadership at a school district, it is entitled to do so.

II. This Court's Review Is Also Needed to Clarify that State Compliance with the Detailed Program Requirements of the No Child Left Behind Act Requires a Finding that the State Has Complied with the Vague Requirements of § 1703(f) of the EEOA.

This case is critically important for another reason. Section 1703(f) of the EEOA of 1974 obligates the State to take "appropriate action to overcome language barriers" that prevent ELL students from equal participation in the educational process. The statute does not define "appropriate action."[17] Under the EEOA, states had been free to craft their own notion of what is needed. After NCLB was enacted in 2001, the federal government was given substantial authority over ELL education by tying substantial

---

state's financial resources. The legislative debate over such allocation is uniquely an exercise of state sovereignty." *Stanley v. Darlington County School District*, 84 F.3d 707, 716 (4th Cir. 1996).

[17] "[I]t is noted that the legislative mandate to take 'appropriate action to overcome language barriers' appearing in § 1703(f) is not a particularly helpful contribution." *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 576 F. Supp. 1503, 1521 (D. Colo. 1983).

federal monies to federally approved programs and accountability standards.

Courts have grappled with the meaning of "appropriate action." In *Guadalupe Organization, Inc. v. Tempe Elem. School Dist. No. 3*, 587 F.2d 1022 (9th Cir. 1978), the Ninth Circuit noted that there is "very little legislative history" for § 1703(f) and that there had been no decision interpreting the "appropriate action requirement" of § 1703(f). *Id.* at 1030. Later, in *Castañeda v. Pickard*, 648 F.2d 989 (5th Cir. 1981), the Fifth Circuit judicially crafted a three-part test to give definition to the words "appropriate action."[18] The *Castañeda* court also described the lack of legislative history to divine congressional intent, but stated two things about the words "appropriate action." First, it underscored that the vague term "appropriate action" meant that state and local authorities were to have a "substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations" under § 1703(f). *Id.* at 1009. Second, the *Castañeda* court observed that the lack of Congressional guidance as to the meaning of "appropriate action" forced that court to prescribe standards, although it was "ill equipped to

---

[18] The three-prong test requires an educational agency to (1) adopt a recognized educational theory; (2) provide programs reasonably calculated to implement the theory; and (3) show, after a period of time, that language barriers are being overcome. 648 F.2d at 1009-1010.

do so" and such a task was better "reserved to other levels and branches of government." *Id.*

The *Castañeda* test has been employed by various courts since 1981. *See Valencia Co. v. Wilson*, 12 F. Supp. 2d 1007, 1017-1018 (N.D. Cal. 1998), *aff'd*, 307 F.3d 1036 (9th Cir. 2002); *Teresa P. by T.P. v. Berkeley Unified School Dist.*, 724 F. Supp. 698, 713 (N.D. Cal. 1989); *Keyes v. School Dist. No. 1, Denver, Colo.*, 576 F. Supp. 1503, 1510 (D. Colo. 1983). Indeed, the District Court applied the *Castañeda* test in this case in the original 2000 order. App. at 184-185.

Congress, under NCLB, has now prescribed those standards which the *Castañeda* court previously lamented were lacking. NCLB amended the Elementary and Second Education Act of 1965. NCLB specifically includes within its scope, improving the academic achievement of language instruction for limited English proficient and immigrant students. 20 U.S.C. § 6801 *et seq.* Essentially, NCLB requires states receiving Title I and Title III funds to develop challenging academic content and student achievement standards that will be used by the state and local school districts to carry out the goals of Title I. *Id.*

The purpose of both EEOA § 1703(f) and NCLB is to ensure that there are effective ELL programs. The stated statutory purpose of NCLB with respect to ELL students is:

> *To help ensure that children who are limited English proficient,* including immigrant children and youth, *attain English proficiency, develop high levels of academic attainment in English, and meet the same challenging State academic content and student achievement standards as all children are expected to meet.*

20 U.S.C. § 6812(1) (emphasis added). EEOA § 1703(f) (emphasis added) requires an educational agency to "*take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.*" There is no daylight between the two statutory goals.[19]

Although the purposes of the two statutes are the same, there is a major difference. NCLB, as a condition of funding, tells the state what it must do to create effective ELL programs, while EEOA § 1703(f)

---

[19] The Ninth Circuit rejected this position and found that the purpose of the two statutes was different. It stated that NCLB is about a "general plan gradually to improve overall performance" of schools, but § 1703(f) is an "equality-based civil rights statute" designed to deal with the immediate rights of ELL students. No one disagrees that the two statutory schemes involve different remedies and may, depending on the circumstances, seek to redress different wrongs. But § 1703(f) requires "appropriate action" which can only mean a program reasonably calculated to teach ELL students English. NCLB actually delineates what programs states must implement to make sure school districts provide ELL students with a reasonable opportunity to learn English. In this fashion NCLB supplements and defines EEOA § 1703(f).

provides no such guidance. NCLB prescribes a series of programs that a state must undertake so that ELL students achieve English fluency and academic achievement: teacher certification (20 U.S.C. § 6826(c)); effective language curricula (20 U.S.C. § 6826(d)); establishment of proficiency standards and benchmarks with proficiency standards aligned to the state's academic standards (20 U.S.C. § 6823(b)); annual assessments to measure proficiency (20 U.S.C. § 6823(b)); submission of detailed plans to the United States Department of Education[20] with standards and objectives as well as enforcement of school district accountability (20 U.S.C. § 6823(b) & (c) and 20 U.S.C. § 6826(a) & (b)).

Arizona put into place an extensive curricular and instructional foundation to demonstrate to the federal government that Arizona school districts meet the programmatic and accountability requirements imposed by NCLB. Every other state receiving funding under NCLB must also meet these fundamental

---

[20] The United States Department of Education is deeply involved in the education of ELL students under NCLB. NCLB requires states to provide effective programs and be accountable for the progress of ELL students. It is no longer necessary to judicially craft notions of what Congress intended regarding the "appropriate action" requirement of § 1703(f) because those requirements are now spelled out. The subsequent and detailed statutory scheme of NCLB should control the interpretation of the prior enacted and general statute, § 1703(f), when, as here, both statutes touch upon the same area and seek to achieve the exact same purposes.

requirements.[21] The federal government deems Arizona in compliance with NCLB and Arizona has worked closely with the United States Department of Education to ensure that its programs meet with

---

[21] The Arizona Department of Education ("ADE"), to comply with NCLB requirements, made major structural changes to ensure that ELL learners receive "appropriate action" from their local school districts. For example, ELL Proficiency Standards were promulgated to provide benchmarks for learning English, allow school districts to design proper curriculum, and permit ELL students to seamlessly meet Arizona's language arts academic standards. (TE 202; Tr. Day 1, pp. 36-45). Arizona also adopted uniform assessment standards that school districts must use annually to identify and evaluate ELL students. That system classifies ELL students, determines when they are proficient, and provides a tracking system to ensure that fluent English proficient students ("FEP") remain proficient. (TE 203, 204; Tr. Day 1, pp. 46-54). Further, Arizona requires all teachers to undergo training and obtain Structured English Immersion ("SEI") endorsements so that they can effectively teach ELL students. These SEI endorsements together with additional training programs undertaken by ADE throughout the State, have become critical factors in ELL learning. (TE 207, 208, Tr. Day 1, pp. 55-70). Many of these steps were approved by the federal government and none of them existed before NCLB. (Tr. Day 1, pp. 36, 43, 45, 47, 50, 55, 65, 70, 158).

NCLB also sets certain minimum targets requiring that specified percentages of a school district's or charter school's ELL students must (1) make progress towards proficiency; (2) achieve proficiency; and (3) achieve success academically (AYP) on Arizona's AIMS tests. (Tr. Day 1, pp. 158-159). Those achievement benchmarks are documented annually through an AMAO. (Tr. Day 1, p. 160). Arizona's required percentages have been approved by the United States Department of Education. (Tr. Day 1, pp. 160, 187). NUSD met all AMAO requirements for 2006. (TE 218; Tr. Day 1, p. 188). *See also* App. at 312.

federal approval. (Tr. Day 1, pp. 36-45, 47, 50, 55, 65, 70, 158, 160, 187).

It is both unfair and irrational for the federal government, on one hand, to approve Arizona's ELL programs as effective under NCLB, but, on the other hand, to allow the federal judiciary to rule that Arizona has failed to take "appropriate action" to assure effective ELL programs under EEOA § 1703(f). States should not be subject to the vague requirement of "appropriate action" under EEOA § 1703(f) when NCLB spells out in detail the definition of what is "appropriate." States should be subject to only one standard – the standard spelled out by Congress in NCLB and implemented by the United States Department of Education.

There is no Supreme Court decision regarding the intersection between EEOA § 1703(f) and ELL requirements under NCLB. States need certainty so that when they provide ELL programming that is approved by the United States Department of Education pursuant to NCLB, they do not remain subject to suit by a plaintiff alleging that the state's ELL framework for education is inadequate under a different set of standards. Unfortunately, as a result of the Ninth Circuit's opinion, Arizona (and other states with similar funding statutes) has been put into precisely that predicament.

The District Court in its March 22, 2007 order, did acknowledge that NCLB "significantly changed" Arizona's approach to education and that "*the Act*

required the State to effectively educate and be accountable for the progress of ELL students." App. at 98-99 (emphasis added). However, it made no specific findings regarding federal requirements imposed on Arizona to provide challenging programs for ELL achievement in both academics and English proficiency. Nor did it address the Superintendent's position that Arizona's compliance with the detailed programming requirement of NCLB mandated a finding of compliance with § 1703(f).

The Ninth Circuit affirmatively rejected the Superintendent's position. It stated that NCLB is merely a "general plan gradually to improve overall performance" of schools, while EEOA § 1703(f) is an "equality-based civil rights statute" designed to deal with the "immediate rights" of ELL students. It further stated that NCLB does not deal with the right of ELL students to redress wrongs under § 1703(f). To support this position, the Ninth Circuit narrowly focused on the accountability requirement of NCLB which requires ELL students to meet "annual measurement achievement objectives ['AMAO'] . . . including . . . making adequate yearly progress" and concluded that acceptance of the Superintendent's position would effectively repeal § 1703(f). The Ninth Circuit claimed that if an AMAO was met one year and not the next, enforcement rights under § 1703(f) would "wink in and out of existence."

The Ninth Circuit mischaracterized the Superintendent's position. An individual ELL student, in a proper case, would be entitled to bring an action

under § 1703(f) to remedy abuses which denied that student an opportunity to learn English. That is not what this case is about. This case is not about an individual student who was denied ELL services at a particular school. Ultimately, this case arose from a claim that Arizona systemically failed to ensure that there was effective ELL programming at NUSD. Arizona now meets specific programming requirements of NCLB so that NUSD ELL students can learn English at the local school district level.

The State programs required by NCLB are not in the planning stage, but are in full force and effect. These programs do not "wink in and out of existence." Nor are they dependent on test scores. They are central, in the District Court's words, to NCLB's requirement that Arizona "effectively educate . . . ELL students." Plaintiffs cannot now contend that Arizona fails to provide a systemic program to ensure school districts such as NUSD institute effective ELL programs when Arizona fully complies with the requirements of NCLB.

To the extent that the term "appropriate action" is not defined in the EEOA and is ambiguous, as acknowledged in *Guadalupe* and *Castañeda*, it is well settled that subsequent legislation may be considered to interpret prior legislation on the same subject. *Busic v. United States*, 446 U.S. 398 (1980); *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Great Northern R. Co. v. United States*, 315 U.S. 262 (1942); *State v. Oregon Short Line R. Co.*, 617 F. Supp. 207 (D. Idaho 1985). Further, different statutes which address the same

subject matter should be read together such that the ambiguities in one may be resolved by the other. *Firstar Bank, N.A. v. Faul*, 253 F.3d 982 (7th Cir. 2001).

Arizona now complies with the extensive accountability system of NCLB to ensure that ELL students master English and meet challenging academic requirements. The extensive requirements of NCLB for ELL students did not exist when the original 2000 order issued. They do now, and states know what they must do to comply with federal mandates regarding the advancement of ELL education. Arizona complies with those mandates. It is illogical to claim that Arizona can simultaneously comply with the stringent requirements of NCLB and still violate the vague requirement of § 1703(f) to "take appropriate action."

A change in law will factor heavily in warranting Rule 60(b)(5) relief in public interest litigation. *Agostini v. Felton*, 521 U.S. 203 (1997). When a government entity seeks modification of a prospective judgment, a flexible and significant change in facts or law standard has been adopted. *Rufo v. Inmates of Suffolk Jail*, 502 U.S. 367 (1992). Further, when the ends of a judgment have been achieved, that judgment should be terminated. *Bd. of Educ. of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237 (1991). The Ninth Circuit noted in *Bellevue Manor Assocs. v. United States*, 165 F.3d 1249 (9th Cir. 1999) that "the *Rufo-Agostini* approach allows courts to fulfill their traditional equity role: to take all the circumstances

into account in determining whether to modify or vacate a prior injunction or consent decree." 165 F.3d at 1256. In this case, the lower courts should have found that the State's compliance with the ELL program requirements of NCLB and the effective program established at NUSD had satisfied the requirements of the EEOA and granted the requested Rule 60(b)(5) relief.

CONCLUSION

This case concerns the power of the federal judiciary to require the State of Arizona to provide earmarked funding for ELL students as the sole means of satisfying a judgment declaring Arizona to be in violation of § 1703(f) of the EEOA. Here, the Ninth Circuit required special funding although the purpose of § 1703(f) was fulfilled by general funding increases, delivery of new state programs, the enactment of NCLB, and better management of ELL services. Because this case involves the exercise of excessive judicial power that overrides notions of federalism, comity, and the need to tailor the scope of the remedy to fit the statutory violation, certiorari is warranted. Certiorari should also be accepted to interpret the vague "appropriate action" requirement of EEOA § 1703(f) in the context of the subsequently enacted specific standards pursuant to Congress' NCLB Act. States should not be left exposed to claims that they violated the EEOA when they are in full compliance with NCLB. The two statutes should be

reconciled and interpreted consistently. Guidance from this Court is needed.

For all of the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted.

ERIC J. BISTROW,
Counsel of Record
DARYL MANHART
MICHAEL S. DULBERG
MELISSA G. IYER
BURCH & CRACCHIOLO, P.A.
702 E. Osborn, Suite 200
Phoenix, Arizona 85014
phone: 602-274-7611
fax: 602-234-0341

Attorneys for
Petitioner Superintendent

August 29, 2008

516 F.3d 1140

United States Court of Appeals, Ninth Circuit.

Miriam FLORES, individually and as a parent of Miriam Flores, minor child; Rosa Rzeslawski, individually and as a parent of Mario Rzeslawski, minor child, Plaintiffs-Appellees,

v.

State of ARIZONA and the Arizona State Board of Education, and its individual members in their official capacities, Defendants-Appellees, Thomas C. Horne, Superintendent of Public Instruction, Defendant-Appellant, and Speaker of the Arizona House of Representatives and President of the Arizona Senate, Intervenors. Miriam Flores, individually and as a parent of Miriam Flores, minor child; Rosa Rzeslawski, individually and as a parent of Mario Rzeslawski, minor child, Plaintiffs-Appellees,

v.

Speaker of the Arizona House of Representatives and President of the Arizona Senate, Intervenors-Appellants, and State of Arizona and the Arizona State Board of Education, and its individual members in their official capacities, Thomas C. Horne, Superintendent of Public Instruction, Defendants.

Nos. 07-15603, 07-15605.

Argued and Submitted Dec. 4, 2007.
Filed Feb. 22, 2008.
As Amended on Denial of Rehearing and Rehearing En Banc April 17, 2008.

David J. Cantelme (argued) and D. Aaron Brown, of Cantelme & Brown, P.L.C., for Intervenors-Appellants

Speaker of the Arizona House of Representatives and President of the Arizona Senate.

Eric J. Bistrow (argued), of Burch & Cracchiolo, P.A., for Defendant-Appellant Thomas C. Horne, Superintendent of Public Instruction of the State of Arizona.

Timothy M. Hogan (argued) and Joy E. Herr-Cardillo, of the Arizona Center for Law in the Public Interest, for Plaintiffs-Appellees Miriam Flores et al.

José A. Cárdenas (argued), Lynne C. Adams, David D. Garner, and Kimberly A. Demarchi, of Lewis & Roca LLP, and Terry Goddard, Attorney General of the State of Arizona, Mary O'Grady, Solicitor General of the State of Arizona, and Susan P. Segal, Assistant Attorney General of the State of Arizona, for Defendants-Appellees State of Arizona and Arizona State Board of Education.

John C. Richardson and Shefali Milczarek-Desai, of DeConcini McDonald Yetwin & Lacy, P.C., for amicus curiae Arizona School Boards Association, Tucson Unified School District, Mesa Unified School District, Sunnyside Unified School District, and Phoenix Union High School District.

Appeal from the United States District Court for the District of Arizona; Raner C. Collins, District Judge, Presiding. D.C. Nos. CV-92-00596-RCC, CV-92-00596-RCC.

Before: B. FLETCHER, BERZON, and RAWLINSON, Circuit Judges.

BERZON, Circuit Judge:

On January 24, 2000, the District Court for the District of Arizona ruled that Arizona was violating the Equal Educational Opportunity Act of 1974, 20 U.S.C. §§ 1701 *et seq.* ("EEOA"), because the state's funding for English language instruction for non-native speakers was "not reasonably calculated to effectively implement the . . . educational theory which" the state had approved. *Flores v. Arizona,* 172 F.Supp.2d 1225, 1239 (*"Flores II"*) (D.Ariz.2000). Eight years later, Arizona has still not satisfied the terms of that judgment, nor complied with the bulk of the injunctions entered against it as a result of that ruling. Although Arizona and the Arizona Board of Education acknowledge that the state remains out of compliance and do not seek to vacate the judgment or the injunctive orders, the Arizona Superintendent of Public Instruction, the Speaker of the Arizona House of Representatives, and the President of the Arizona Senate moved for relief from judgment.[1] We affirm the district court's denial of relief.

---

[1] The Arizona School Boards Association, Tucson Unified School District, Mesa Unified School District, Sunnyside Unified School District, and Phoenix Union High School District filed an amicus brief supporting Arizona, the Board of Education, and the plaintiffs. They emphasize the many pedagogical challenges districts face in attempting to educate students who are not fluent in English and the substantial resource costs those hurdles create. In their view, "Arizona school districts have performed an admirable job of educating [English language learner] students despite being grossly under-funded by the

(Continued on following page)

I. BACKGROUND

It has been more than fifteen years since the initial complaint in this action was filed and eight years since the final judgment on liability issued. The post-judgment relief process has been arduous, with Arizona moving forward, to the considerable degree it has, largely in response to a consent decree resulting from this litigation and a series of post-judgment relief orders. Over this long period, local and national conditions have shifted in significant ways. The moving parties contend they have done so sufficiently as to warrant relief from judgment, even though Arizona has never complied with the specific terms of the present injunction against it. Explaining why that argument fails requires rehearsing the history of this case. We do so here, beginning with the complaint and Declaratory Judgment, moving through the intermediate post-judgment orders, and then discussing in detail the proceedings leading up to this case, which were triggered by a new state funding statute and resulted in an eight-day evidentiary hearing.

State. School districts are already stretched to their limits both economically and in terms of morale and personnel. They will continue to struggle to provide quality [programs for such students] without additional assistance and resources from the State." They further note that "Arizona school districts cannot divert general education funding to . . . programs [for such students] without seriously crippling school districts' ability to provide all other aspects of a public education."

A. The EEOA and the Complaint

Nogales is a small city along the Mexican border in southern Arizona. In 1992, when this suit began, the population of the Nogales Unified School District ("NUSD") was almost entirely Hispanic; that is still so. Most of its approximately 6,000 students come from homes where Spanish is the first language. These students are distributed among six elementary schools, two middle schools, one high school, and one alternative high school. The great majority of the district's students are classified as English language learners ("ELL") for at least some portion of their academic careers. In 2006, for instance, thirty percent of the students were in ELL programs and an additional sixty percent had been in such programs. Although Arizona's theory of ELL instruction has changed over the years, the enormous importance of such programs to students and parents in Nogales has not.

ELL students and parents in Nogales (we refer to them as "Flores," after class representative Miriam Flores), were faced with serious inadequacies in ELL instruction and sued to correct them. The suit proceeded as a class action, with the class defined as "all minority 'at risk' and limited English proficient children now or hereafter, enrolled in Nogales Unified School District . . . , as well as their parents and guardians."

Flores' second amended complaint, filed November 29, 1996, primarily alleged that the "State has

failed to provide financial and other resources necessary for adequate implementation of mandatory [ELL] programs by public school districts in Arizona," because "[t]he cost of [ELL] instruction complying with federally prescribed state mandates far exceeds the only financial assistance the State theoretically provides school districts for such purposes." As a result, Flores contended, Arizona, the state Superintendent, and the state Board of Education violated the EEOA.

> The relevant portion of the EEOA provides:
>
> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by –
>
> . . . (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

20 U.S.C. § 1703. This provision of the EEOA was intended to remedy the linguistic discrimination identified by *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974), in which the Supreme Court held that failing to provide for the needs of non-English speaking students "is to make a mockery of public education," rendering classroom experiences for these children "wholly incomprehensible and in no way meaningful." *Id.* at 566, 94 S.Ct. 786; *see also Castaneda v. Pickard*, 648 F.2d 989, 1008 (5th Cir.1981) (noting that the EEOA codifies the "essential holding

of *Lau, i.e.,* that schools are not free to ignore the need of limited English speaking children for language assistance to enable them to participate in the instructional program of the district.").[2]

Flores alleged that such needs were not being met in Arizona. She charged Arizona with "administer[ing] a school finance scheme that is just sufficient to let less distressed, predominantly Anglo districts impart State-mandated essential skills to their mainstream student bodies . . . but that does not and will not enable NUSD or similarly situated districts to impart the same State-mandated essential skills to decisively minority enrollments requiring expanded compensatory programs, smaller class sizes and further efforts of like nature in order to acquire them."

Flores' complaint was premised on the EEOA analytic framework provided by the Fifth Circuit in *Castaneda. See* 648 F.2d at 1009-10; *see also Gomez v. Illinois State Bd. of Educ.,* 811 F.2d 1030, 1041-42 (7th Cir.1987) (applying the *Castaneda* analysis). The *Castaneda* framework is three-fold: First, courts must

---

[2] The EEOA contains an express private right of action, 20 U.S.C. § 1706, under which this suit proceeds. *See Flores v. Arizona,* 48 F.Supp.2d 937, 940 ("*Flores I*") (D.Ariz.1999) (holding that the plaintiffs could proceed under § 1706). We have held that § 1706 abrogates state sovereign immunity. *Los Angeles NAACP v. Los Angeles Unified School Dist.,* 714 F.2d 946, 950-51 (9th Cir.1983); *see also Gomez v. Illinois State Bd. of Educ.,* 811 F.2d 1030, 1037-38 (7th Cir.1987) (same). Arizona does not contend otherwise.

be satisfied that the "school system is purs[uing] a program informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy." *Castaneda,* 648 F.2d at 1009. Second, "the programs and practices actually used by a school system [must be] reasonably calculated to implement effectively the educational theory adopted by the school." *Id.* at 1010. There must, in other words, be sufficient "practices, resources and personnel . . . to transform the theory into reality." *Id.* Third, even if theory is sound and resources are adequate, the program must be borne out by practical results. *Id.* Flores alleged, consistent with *Castaneda* step two, that Arizona had "failed to provide financial and other resources necessary for adequate implementation" of its ELL programs.

B. The Declaratory Judgment and Arizona's School Funding System

After lengthy pre-trial proceedings and a bench trial, the district court on January 24, 2000, held that Arizona was in violation of the EEOA and granted declaratory judgment in Flores' favor.[3] *See Flores II,* 172 F.Supp.2d at 1239. Of the many issues raised in Flores' complaint, only one EEOA issue was decided

---

[3] The earlier proceedings, which involved changes of counsel on both sides and various other procedural hurdles and delays, are summarized in *Flores I,* 48 F.Supp.2d at 943-46.

by the court: "[W]hether or not Defendants' [sic] adequately fund and oversee the *Lau* program in NUSD. . . ."[4] *Id.* at 1226. The rest of the EEOA violations originally alleged, including failures adequately to evaluate and monitor ELL students, to provide tutoring and other forms of compensatory instruction, and to design successful ELL programming, were covered by a consent decree approved by the district court on July 31, 2000. *See id.*

The particulars of Arizona's school funding system are therefore at the heart of this case. We pause to describe them here.

Consistent with Article XI, § 1 of the Arizona Constitution, school funding in Arizona is designed to be essentially equal across districts, despite differences in local property values. *See Roosevelt Elementary Sch. Dist. No. 66 v. Bishop,* 179 Ariz. 233, 877 P.2d 806, 811-16 ("*Roosevelt I*") (Ariz.1994).[5] To ensure equality, the state calculates the maximum support level a district may spend, referred to as the revenue control limit, *see* ARIZ.REV.STAT. § 15-947, and then pays the difference between that level and the amount the district can raise by levying a state-mandated tax

---

[4] Because 20 U.S.C. § 1703(f) codifies the central holding of *Lau,* ELL programs are sometimes referred to as "*Lau* programs."

[5] Article XI, § 1 provides in pertinent part that "[t]he Legislature shall enact such laws as shall provide for the establishment and maintenance of a *general and uniform* public school system." (Emphasis added).

rate against property in its area, *see* ARIZ.REV.STAT. § 15-971. Thus, regardless of the local tax base, the amount each district can spend per pupil is roughly equalized statewide, by first setting a maximum spending level and then making up the gap between local tax revenues and that level with state funds.[6]

The revenue control limit, and hence the district support level, is calculated by adding together funds designated for transporting students to school, *see* ARIZ.REV.STAT. § 15-945, and "base support" funds, *see* ARIZ.REV.STAT. §§ 15-943, 944. It is these base funds with which we are primarily concerned.[7] These funds are unrestricted – school districts may spend them essentially as needed – and do not appear to have been calibrated "to any minimum amount necessary for a basic education." *See Roosevelt I,* 877 P.2d at 810. Nonetheless, they represent the core funding provided for such an education.

Funding allocations are made by using a weighting system: A per pupil weighted amount of funding is calculated by multiplying a "support level weight" (which varies by district type and size and by the

---

[6] School districts may also try to pass ballot measures, called "overrides," to raise county taxes and so secure funds above the revenue control limit. *See* ARIZ.REV.STAT. § 15-481.

[7] These funds, along with other federal, state and county funds, including funds provided to support ELL students, are sometimes referred to as "maintenance and operation" or "M & O" funds. *See Savage v. Glendale Union High Sch. Dist. No. 205,* 343 F.3d 1036, 1041 (9th Cir.2003).

student's grade level) by a statewide baseline amount. *See* ARIZ.REV.STAT. §§ 15-943(1)(a)-(2)(a) (weights), 15-901(B)(2) (baseline). For the 2006-2007 school year, for instance, the statewide baseline amount was $3,133.53. ARIZ.REV.STAT. § 15-901(B)(2)(a). The support level weight for a typical student in grade eight in most school districts is 1.158, ARIZ.REV.STAT. § 15-943(2)(a), so a district could spend $3,628.63[8] to support that student in 2006-2007.

Not all students are "typical," of course. Some have special needs which impose additional, incremental costs. ELL students, for example, naturally require additional support. Arizona's funding formula provides for these incremental costs through an additional "Group B" weighting system which adds additional funding for various student groups, including ELL students. *See* ARIZ.REV.STAT. § 15-943(2)(b). In 2006-07, for instance, the Group B weight for ELL students was 0.115, so a district received an *additional* $360.36[9] to cover the ELL component of that student's education, on top of the base level $3,628.63 provided for each pupil.

The core assumption of Arizona's funding formula, then, is that ELL students impose *incremental* costs on a district, above the base level funding

---

[8] This figure is the product of the support level weight (1.158) multiplied by the baseline amount ($3,133.53).

[9] This figure is the product of the Group B weight (0.115) multiplied by the baseline amount ($3,133.53).

allocation. So, while all of the funding (base level and Group B weights) is allocated to the district as a block grant, a district that spends more on ELL incremental costs than allocated is necessarily spending less on basic educational needs per pupil.

Taking this framework as a given, the district court in its 2000 declaratory judgment opinion inquired whether Arizona's funding specifically for ELL students – the Group B weights – actually covered the incremental costs of ELL programming. The court found that it did not. *Flores II,* 172 F.Supp.2d at 1239.

This finding was well supported. Arizona had conducted a cost study in 1987-88 which determined that school districts were spending about $450 (in 1988 dollars, unadjusted for inflation) per ELL student. *Id.* at 1228. This study was seriously methodologically flawed; it did not, for instance, determine what districts *should* be spending. But even by the study's flawed measure, Arizona's ELL funding was inadequate on a statewide basis. Twelve years after the study, the district court found, Arizona's ELL Group B weight, 0.60, provided only about $150 per student. *Id.* at 1238-39.

That this support was inadequate to live up to Arizona's EEOA obligations to its school districts and their students was supported by several examples of resource-linked ELL program deficiencies in NUSD, including:

> 1) too many students in a class room,
>
> 2) not enough class rooms,
>
> 3) not enough qualified teachers, including teachers to teach [English as a Second Language] and bilingual teachers to teach content area studies,
>
> 4) not enough teacher aids,
>
> 5) an inadequate tutoring program, and
>
> 6) insufficient teaching materials for both [English as a Second Language] and content area courses.

Id. at 1239.

In short, Arizona's "minimum base level for funding *Lau* programs [was] arbitrary and capricious and [bore] no relation to the actual funding needed to ensure that [ELL] students in NUSD are achieving mastery of its specified 'essential skills.'" *Id.* In particular, the court held, the ELL Group B weight appropriation was "not reasonably calculated to effectively implement" the ELL programs, and Arizona had, therefore, "failed to follow through with . . . resources . . . necessary to transform theory into reality," as the *Castaneda* framework requires.[10] *Id.*; *see Castaneda,* 648 F.2d at 1010.

---

[10] The district court was aware that base support funds could be diverted to ELL students if the target Group B weight funding is inadequate and a district so chooses. *Flores II,* 172 F.Supp.2d at 1229. Because base level funds support typical

(Continued on following page)

C. Post-Judgment Relief and Arizona's ELL Programs

The judgment was not appealed. Nonetheless, Arizona did not take action to eliminate the violations found in the Declaratory Judgment. Instead, the state legislature defeated several attempts to commission an adequate study of ELL costs that would enable it to set appropriate ELL funding levels.

In October of 2000, ten months after the issuance of the Declaratory Judgment, the district court ordered Arizona to "prepare a cost study to establish the proper appropriation to effectively implement" ELL programs. *Flores v. Arizona*, 160 F.Supp.2d 1043, 1047 ("*Flores III*") (D.Ariz.2000). Such a study was critical, the court indicated, because "as a matter of law the State's minimum base level for funding *Lau* programs bears no relation to the actual funding needed to ensure that [ELL] students are achieving mastery of the State's specified 'essential skills.'" *Id.* at 1044. This injunction was not appealed either.

Shortly after the injunction issued, in November 2000, Arizona voters approved two propositions that altered Arizona's school funding and ELL programs. Proposition 203 largely abolished bilingual education, replacing it with sheltered English immersion, a

---

students, the district court focused on the Group B weights, *see id.* at 1238, which are, again, the amount that Arizona projects will be necessary to spend *in addition* to the base level funds to meet the special needs of ELL students.

teaching method "in which nearly all classroom instruction is in English but with the curriculum and presentation designed for children who are learning the language." ARIZ.REV.STAT. § 15-751(5). Proposition 301 increased school funding generally in Arizona through a sales tax increase. *See* ARIZ.REV.STAT. § 15-901.01. Prop. 301 funding is available for many purposes but is not directed specifically towards ELL programs. *See* ARIZ.REV.STAT. § 42-5029(E)(1)-(10).

Meanwhile, as ordered, Arizona commissioned a cost study (we refer to it as the "SjobergEvashnek study," after the consulting group that largely directed it). The final study, however, proved to be a disappointment. It did not estimate the incremental costs of EEOA compliance, but instead reported on what several districts nationwide were spending. The study reported widely variable incremental costs for various ELL programs, ranging from about $185 to $3,000 per ELL student. It also found that NUSD was spending $331.60 in incremental costs per pupil, while noting that the NUSD program might not "fully address the unique and extraordinary needs of [NUSD's ELL] population."

Some additional guidance came from a study conducted by the staff of several Democratic members of the legislature (the "Staffers' study"), also released in 2001. Aggregating data from other states and from Arizona, the Staffers' study estimated $1527 in incremental costs per student would be required for EEOA compliant programs – a number, it noted,

which was generally consistent with the experience of other states.

Arizona did not act on either study. After Flores again moved for post-judgment relief, the court, on June 25, 2001, restated its holding that "as a matter of law the State's minimum base level for funding *Lau* programs" was not rationally linked to "funding needed to ensure that [ELL] students are achieving mastery of the State's specified 'essential skills.' "*Flores v. Arizona,* No. CV-92-596, 2001 WL 1028369 at *1 ("*Flores IV*") (D.Ariz.2001). It ordered Arizona to provide funding that "shall bear a rational relationship to the actual funding needed" by no later than January 31, 2002. *Id.* at *2. This injunction, too, was not appealed.

The legislature responded by enacting HB 2010 on December 19, 2001. That law increased the ELL Group B weight to 0.115, which generated, at that time, about $339.61 per student, roughly the amount that NUSD was recorded as spending in the Sjoberg Evashnek study. HB 2010 also provided funds for a more comprehensive cost study than had been done previously. Contending that HB 2010 was not adequate, Flores again moved for post-judgment relief.

Initially, the district court agreed with Flores. It held, in an order issued on April 8, 2002, that the $339.61 in base level funding was not adequate because it was based on NUSD's *actual* spending (as of 2001), which generated "the very program that this Court's Declaratory Judgment held to be deficient."

Flores v. Arizona, No. CV-92-596 at 3 (*"Flores V"*) (D.Ariz.2002). A few months later, however, the court reconsidered, on Arizona's motion, and held that HB 2010's funding levels were adequate "as an interim measure pending further study and review," including the cost study funded by HB 2010. *Flores v. Arizona,* No. CV-92-596 at 1-2 (*"Flores VI"*) (D. Ariz. June 12, 2002). The order was not appealed, and three years passed.[11]

Again, the legislature gathered some data and, again, it did not act upon the data it received. As part of HB 2010, the legislature commissioned a detailed cost study from the National Conference of State Legislatures (the "NCSL study"). NCSL submitted a first draft in August 2004 and a second draft in February 2005, upon which we rely. The study used two approaches: A survey sent to Arizona school districts to determine then-current ELL program spending and two expert panels, one of state and one of national experts, convened to estimate the costs of EEOA-compliant ELL programs.

---

[11] Among the events of those years was another general school funding increase. In November 2002, Arizona voters approved Proposition 202, which dedicated a portion of the state's share of Indian casino gambling proceeds to a school improvement fund for teacher compensation, class size reduction, dropout prevention, and instructional improvement programs. *See* ARIZ.REV.STAT. §§ 5-601.02(H)(3)(b)(I); 15-979. None of these monies are specifically directed to ELL programs.

The school district survey was hampered by a small response rate – only seven of the sixteen surveyed districts provided data. NCSL noted the problem but analyzed the available data, which showed an average expenditure of $669.35 per pupil in incremental costs. NCSL cautioned that this data was limited and of questionable quality, noting that the cost figure might be "somewhat understated."

Expert estimates of appropriate (rather than actual) spending were significantly higher. The national expert panel recommended a range of spending, based on the degree of students' need for help and grade level from $1,026 per pupil for low-need students at the high school level to $2,571 for high-need elementary school students. The state expert panel recommended spending $1,785 in per pupil incremental costs in grades K-2 and $1,447 in grades 3-12.

Again, Arizona did not act to bring its system into line with either set of cost data. Again, Flores moved for post-judgment relief.[12] On January 28, 2005, the court set an April 30, 2005 deadline for Arizona to "appropriately and constitutionally fund[ ] the state's ELL programs taking into account the

---

[12] Not long before this motion was filed, the litigation was transferred from Senior District Judge Alfredo C. Marquez, who had handled it from the outset, to District Judge Raner C. Collins.

Court's previous orders." *Flores v. Arizona,* No. CV-92-596 at 5 (*"Flores VII"*) (D.Ariz.2005).

D. The First Contempt Order and HB 2064

Arizona failed to act before the deadline. Flores moved for sanctions. On December 15, 2005, deploring the fact that "[t]housands of children who have now been impacted by the State's inadequate funding of ELL programs had yet to begin school when Plaintiffs filed this case," the court held that Arizona was in civil contempt. *Flores v. Arizona,* 405 F.Supp.2d 1112, 1113, 1119 (*"Flores VIII"*) (D.Ariz.2005). It set a deadline of fifteen days after the start of the 2006 legislative session for compliance with its order, and imposed a schedule of fines that would begin to accrue if Arizona did not act and that were to be distributed to Arizona schools to support ELL students. *Id.* at 1120-21; *see also* Order re: Distribution of Fines, No. CV-92-596 (D.Ariz. March 16, 2006).

Arizona did not enact compliant legislation and accrued over $20 million in fines. Eventually, in the spring of 2006, Arizona Governor Janet Napolitano allowed HB 2064, the legislature's effort to create a permanent compliant funding system, to become law without her signature.[13]

---

[13] Governor Napolitano's statement on HB 2064 appears later in this opinion.

HB 2064 is consistent with Arizona's "base costs plus Group B weights" approach to education funding, but includes some additional ELL funds designed to cover incremental costs above Group B weight levels, although there are no guaranteed appropriations for these funds. Along with this funding structure, the statute provides for further statewide standardization of ELL programs, presumably in part to make it possible for the state more easily to monitor and assess the impact and use of allocated funds and the need for additional funds.

To drive the standardization process, HB 2064 creates the "Arizona English language learners task force" within the state Department of Education. *See* ARIZ.REV.STAT. § 15-756.01. The task force is "to develop and adopt research based models of structured English immersion programs for use by school districts and charter schools." *Id.* at § 15-756.01(C).[14] Each school district and charter school is to adopt one of the models or request a waiver. *See* ARIZ.REV.STAT. § 15-756.02. To aid in implementing the models, HB 2064 also creates an "Office of English language acquisition services," which is to develop guidelines for monitoring ELL students and programs, create teacher training programs, and provide other forms of technical assistance. *See* ARIZ.REV.STAT. §§ 15-756.07, 15-756.08. Finally, the

[14] The models are "limited to a regular school year and school day," *id.* at § 15-756.01(E), and do not provide guidance for after-school and summer school programs.

state Board of Education is charged with developing a structured English immersion "endorsement" program for use in training and certifying Arizona's teachers. *See* ARIZ.REV.STAT. § 15-756.09.

The models, and ELL education generally, are funded by three mechanisms under HB 2064, representing significant potential increases in ELL funding but coming with significant limitations:

First, HB 2064 raises the Group B weight for ELL students from 0.115 to 0.140, which corresponds to an increase from about $340 per student to about $450 per student. *See* HB 2064 § 6, to be codified at ARIZ.REV.STAT. § 15-943(2)(b).[15] There is, however, a significant cut-back as well: Unlike earlier Group B weight funding, under HB 2064 Group B "funding for the same ELL pupil shall not be provided for more than two fiscal years." HB 2064 § 6.

Second, HB 2064 establishes the "Arizona structured English immersion fund," which provides supplemental funds above the Group B weights to implement the models. *See* ARIZ.REV.STAT. § 15-756.04. Those funds come, however, with several restrictions. Like the Group B weights, they are limited to two years of availability for any one student. ARIZ.REV.STAT. § 15-756.01(J). And only "incremental costs" of the programs are funded, which are defined as those "in addition to the normal

---

[15] As we note below, this increase is not yet in effect.

costs of conducting programs for English proficient students," *id.* at § 15-756.01(L), and which do not include "compensatory instruction." "Compensatory instruction" consists of "programs in addition to normal classroom instruction . . . [which] are limited to improving the english proficiency of current english language learners and pupils who were english language learners and who have been reclassified as english proficient within the previous two years." ARIZ. REV. STAT at § 15-756.11(G).

In addition, the amount of money provided by the structured English immersion fund is offset by the following funding sources:

> 1. All federal title III monies and any other federal monies designated solely for the educational needs of english language learners.
>
> 2. The portion of title I and title II A monies determined by the english language learner population as a percentage of the qualified population.
>
> 3. The portion of impact aid monies determined by the english language learner population as a percentage of the qualified population. A school district or charter school shall only apply unexpended impact aid monies to english language learner programs after it has applied its impact aid monies for other allowable uses as permitted by state law.

> 4. The portion of [monies the district may levy to further desegregation efforts pursuant to ARIZ.REV.STAT.] § 15-910 . . . determined by the english language learner population as a percentage of the qualified population.
>
> 5. The ELL [Group B] weight. . . .

ARIZ.REV.STAT. § 15-756.01(I)(1)-(5). At the same time, HB 2064 provides that "[m]onies from the fund [are to be used] . . . to supplement existing programs for english language learners. . . . [and] shall not be used to supplant available monies used to pay for the normal costs of conducting programs for english proficient students." ARIZ.REV.STAT. § 15-756.04(F).

Importantly, there is no guaranteed legislative appropriation for the structured English immersion fund. Instead, after school districts and charter schools submit budget requests, the Department of Education is to verify and "collect all . . . [the] requests and submit them to the [Arizona] legislature for funding." ARIZ.REV.STAT. § 15-756.03(C). The legislature is not required to appropriate any monies to fund such requests.

Third, HB 2064 establishes the "statewide compensatory instruction fund" to be used for compensatory instruction only. *See* ARIZ.REV.STAT. § 15-756.11. These funds, too, come with a caveat: They "shall not be used to supplant any federal, state or local monies, including desegregation monies . . . , used for compensatory instruction that [had been] budgeted for english language learners as of February

23, 2006." *Id.* at § 15-756.11(E). In other words, the state funds provided must not replace any funds already in use for the same purpose. The total amount of funding is also limited. Although the legislature appropriated $10 million for this program for the 2006-07 fiscal year, no further appropriations are required by the statute. HB 2064 § 9.

HB 2064 was for the most part immediately effective. School districts and charter schools, however, could not adopt the models until they were developed, which they now have been. Also, monies for the structured English immersion fund do not have to be appropriated and to this point have not been. Most importantly, the provisions associated with the Group B weight increase, require court approval. In this regard, HB 2064 provides:

> [The Group B weight increase and appropriation to fund it, along with the two-year cut-off] do not become effective unless the United States District [C]ourt for the [D]istrict of Arizona in the case of [*Flores v. State of Arizona*] issues an order that, by this act, the state has taken appropriate action to establish a program that addresses the orders in the case and, at least on an interim basis, the court will permit this act to be fully implemented to determine whether the resulting ELL plans and available funding to implement the plans bear a rational relationship to the cost of implementing appropriate language acquisition programs.

HB 2064 § 15(A).

Although Governor Napolitano allowed HB 2064 to become law, she did so without vouching for its compliance with the 2005 court order or with the Declaratory Judgment. To the contrary, she announced that she was "convinced that getting this bill into court now is the most expeditious way ultimately to bring the state into compliance with federal law," and requested that the Attorney General move the court for expedited consideration of the law.[16]

---

[16] Governor Napolitano's statement on the matter provides, in relevant part:

> I received House Bill 2064, related to [ELL] programs. I have decided to allow the bill to become law without my signature so that we can move this dispute to a different forum and get a ruling from the *Flores* Court as to its sufficiency. After nine months of meetings and three vetoes, it is time to take this matter to a federal judge. I am convinced that getting this bill into court now is the most expeditious way ultimately to bring the state into compliance with federal law.
>
> . . . .
>
> Although I am allowing House Bill 2064 to become law without my signature, I do not believe this bill meets either the Court's multiple orders or our existing consent decree. It fails in a number of important ways, including but not limited to:
>
> • *Arbitrary Funding Level:* there is no reason to believe that the funding contained in House Bill 2064 bears any rational relationship to the actual cost of implementing a successful language acquisition program.
>
> • *Failure to Ensure Academic Accountability:* the point of teaching children to speak, read and write in English is to allow them to succeed academically and

(Continued on following page)

E. The First Relief from Judgment Ruling and the Remand

By this point, six years after the Declaratory Judgment, the positions of the parties had shifted, with Arizona and the state Board of Education abandoning their defense of the suit and largely siding with Flores. As a result, when, on March 3, 2006, the state Attorney General moved on behalf of Arizona for the court to consider whether HB 2064 satisfied its order, he was arguing *against* Arizona's own law.

The Superintendent, however, maintained his position and was joined by the Speaker of the Arizona House of Representatives and the President of the Arizona Senate as intervenors (we refer to them as

---

to ultimately become contributing members of the workforce. This bill cuts off funding to students after two years, regardless of their academic progress and does not ensure ELL students would even be able to pass AIMS [Arizona's achievement test].

- *Failure to Determine Program Effectiveness:* rather than using respected experts to advise the state on best practices and the real costs of ELL instruction, House Bill 2064 instead creates a system by which political appointees with no required minimum qualifications make important educational policy decisions.

- *Unwise Creation of a New Bureaucracy and Excess Paperwork:* the bill adds an extra layer of government and does not focus on long-term student success.

- *Violation of Federal Supplanting Laws:* the bill requires ELL payments to school districts and charter schools to be reduced by the amount of federal monies they receive, in violation of federal law.

the "Legislative Intervenors"). Later that March, these parties moved to purge contempt and, in the alternative, for relief from judgment under Rule 60(b)(5). Their joint motion was based largely on HB 2064, which, they contended, "creates a plan for adequate funding of programs for [ELL students]," and brings Arizona into compliance.

The district court disagreed, ruling on April 25, 2006, that HB 2064 does not comply with its orders or with the Declaratory Judgment because the "Act does not [bear] any rational relationship to the cost of providing an ELL program . . . and it has added new hurdles to the mix." *Flores v. Arizona,* No. CV-92-596 at 3 ("*Flores IX*") (D.Ariz.2006). The court held the Group B weight increase insufficient, and the two-year cut-off on most funds irrational. *Id.* at 7-8. The two new funds, moreover, were structured in ways that violated federal law. *Id.* at 4-7. The Superintendent and Legislative Intervenors appealed both that order and the December 2005 contempt order.

On August 23, 2006, in an unpublished memorandum disposition, this court vacated both orders as well as the obligation to pay fines. *Flores v. Rzeslawski,* 204 Fed.Appx. 580 ("*Flores X*") (9th Cir.2006). The court noted that "the landscape of educational funding has changed significantly" since 2000 and remanded for the district court to hold "an evidentiary hearing . . . regarding whether changed circumstances required modification of the original court order or otherwise had a bearing on the appropriate remedy." *Id.* at 582. The court made clear

that it reached none of the other issues in the case. *Id.*

F. The Evidentiary Hearing

On remand, the district court held an eight-day hearing in January 2007. Testimony at the hearing focused on three broad areas: (1) HB 2064 and other changes in Arizona's ELL programming and funding; (2) conditions in NUSD; and (3) conditions in other school districts statewide. As the evidence adduced in the hearing is at the core of our inquiry today, we summarize it in some detail here.

1. Statewide Changes

As is required by the *Flores* consent decree, Arizona has significantly improved its ELL infrastructure. It has also increased overall school funding and, to a lesser degree, ELL program-specific funding. Nonetheless, Arizona's 134,000 ELL students continue to lag behind statewide average test results for all students.

The new administrative structure created by HB 2064 augments Arizona's efforts to further improve and standardize ELL programs statewide. The state Department of Education holds regular seminars and training sessions and has developed monitoring protocols for school districts. State-developed proficiency standards for ELL students are used to evaluate programs and to identify problems. Arizona has

also made efforts to standardize the testing used to classify children as ELL or English proficient.[17] Perhaps most importantly, after August 31, 2006, all classroom teachers, supervisors, principals, and superintendents are required to obtain an endorsement in ELL teaching methods. *See* ARIZ.REV.STAT. § 15-756.09; ARIZ. ADMIN. CODE R7-2-613(J).

Along with these ELL-specific structural changes, Arizona has increased overall school funding.[18] On an inflation-adjusted statewide basis, including all sources of funding, support for education has increased from $3,139 per pupil in 2000 to an estimated $3,570 per pupil in 2006. Adding in all

---

[17] Before 2004, Arizona allowed districts to select among four different tests to decide when to "reclassify" students out of ELL programs into mainstream classes. Beginning in 2004, Arizona instituted the Stanford English Language Proficiency Assessment ("SELP"), which was in use from 2004 through 2006. SELP was generally regarded as too easy to pass, and reclassification rates increased measurably during its use. Arizona fine-tuned SELP, renaming it the Arizona English Language Learner Assessment ("AZELLA"), and has been using the new test since the fall of 2006. The transition from SELP to AZELLA appears to have measurably decreased reclassification rates. As a result of these shifts in testing methodology, ELL reclassification rates are not easily comparable over the years.

[18] Broader state efforts for at-risk children generally benefit some ELL students. These efforts include several funding streams for tutoring programs. In one tutoring program, 88% of ELL students were able to raise their scores by one achievement level in at least one subject area of Arizona's standardized academic achievement tests; 92% of non-ELL students in the same program so raised their scores.

county and local sources, funding has gone from $5,677 per pupil in 2000 to an estimated $6,412 per pupil in 2006. Finally, federal funding has increased. In 2000, the federal government provided an additional $526 per pupil; in 2006, it provided an estimated $953.[19]

Arizona's ELL-specific funding increases are associated with HB 2010 and HB 2064. At the hearing, two important points concerning HB 2064 emerged: First, none of the defense witnesses were able to establish what data, if any, the Group B weights are based upon. The weights do not appear to have been set with regard to any specific program costs, known or estimated. Second, Flores' expert on federal educational funding statutes, Thomas Fagan, testified that if the federal government concluded that HB 2064 was in violation of federal statutes, it could take significant enforcement actions, including a cut-off of some or all federal education funds.[20]

Despite Arizona's expanded ELL infrastructure and budget, ELL students still achieve below – and often far below – state average passage rates on Arizona's "AIMS" academic achievement test and fall

---

[19] Arizona has also significantly increased spending on school physical plant needs, largely in response to another class-action suit. *See Roosevelt Elementary Sch. Dist. No. 66 v. Arizona*, 205 Ariz. 584, 74 P.3d 258, 259-263 ("*Roosevelt II*") (Ariz.Ct.App.2003).

[20] We discuss these potential violations and their consequences below.

below the minimum passage rates Arizona must meet to reach the "annual measurable objectives" required by the No Child Left Behind Act of 2001 ("NCLB"), Pub.L. No.107-110, 115 Stat. 1425, as test results from the 2004-05 and 2005-06 school years show.[21] *See* 20 U.S.C. § 6842 (federal standards).

These test results must be viewed with two significant caveats: First, because AIMS testing was not carried out in 2000, we do not know whether the performance of ELL students has improved relative to that time. Second, Arizona has changed the AIMS test itself, including altering the passing score, and has twice changed the system it uses for reclassifying ELL students – once at the beginning of the 2004-05 school year, and again at the start of the 2006-07 school year. Results for those students classified as ELL across those years are therefore not clearly comparable.

Due to these limitations, and to a general lack of longitudinal data on individual ELL students, we do not have data that conclusively demonstrates whether ELL programs ultimately succeed – that is, whether children pass through them rapidly and ultimately perform as well as non-ELL students. So, while the test results we next discuss are certainly

---

[21] Standardized tests do not, of course, provide a full measure of a school's successes and failures. Educational quality is too complex to be reflected in a single score. But test scores do provide us with at least a rough sense of relative performance, and so are useful here.

troubling, it is important to understand the limits of their analytic reach.

With these caveats, we turn to the data. While Arizona students generally exceeded NCLB-mandated passage rates in math and reading, passing the AIMS test at rates of between 60% and 70%, ELL students were far behind. For example, among third graders, who pass the exam at a higher rate than older ELL students, only 50% passed the math exam in 2005 and just under 40% passed the reading exam in the same year.[22] The situation grows worse at higher grades – in 2005 only 33% of ELL tenth graders passed math and only 20% passed in 2006. In reading, only 30% passed in 2005 and that number fell to barely more than 10% in 2006. In neither year did ELL reading scores in any grade meet federal standards, and in 2006 ELL students' math test results for all grades also fell below the federal line at every grade level.

Nor do students necessarily leave ELL status rapidly. While all witnesses agreed that some students may swiftly become proficient in English, they also agreed that many will need ELL instruction for more than two years, and that some will still need help after three years of training.

---

[22] The passage rates for third graders in 2006 were even lower: 40% for math and 30% for reading.

In short, despite considerable efforts, and some improvements in outcomes, Arizona, as a state, does not appear to have turned the corner on ELL education performance.

2. Conditions in Nogales

The statewide achievement gap between ELL and non-ELL students is also present in NUSD, although the district has made significant strides since 2000. The improvements it has made, however, appear to be due largely to successful management rather than to adequate state funding for ELL programs. The record indicates that with adequate incremental ELL funding, the improvements could have been greater and this gap could have been further narrowed.

a. Policy Changes and Test Results

Much of the improvement at NUSD stems from the successful management of Kelt Cooper, the district's Superintendent from 2000 to 2005. His successor, Dr. Guilermo Zamudio, has largely sustained Cooper's management policies. Despite the efforts of both superintendents, however, ELL students in Nogales continue to face serious challenges.

Cooper, who took the helm at about the time the Declaratory Judgment issued, adopted policies that ameliorated or eliminated many of the most glaring inadequacies discussed by the district court at that

time. Cooper was able to reduce class sizes by enforcing restrictions on the district's open enrollment policy, significantly improving student/teacher ratios. In addition to lowering class sizes, Cooper improved teacher quality by changing the district's policies regarding the hiring of experienced teachers and by refusing to pay unqualified teachers who had been certified on an emergency basis as if they had the proper experience. He also fired many teachers' aides, many of whom were, he found, largely unqualified. Cooper also worked to institute district-wide student performance monitoring. Additionally, he pioneered a uniform system of textbook and curriculum planning, and he largely eliminated what had been a severe shortage of instructional materials by better accounting for and preserving available materials and by acquiring new materials when needed.

Using careful financial management and applying for "all funds available," Cooper was able to achieve his reforms with limited resources. His budget did, however, rise between two and four percent annually, partly because the district twice passed an override, that is, a county-wide tax measure.

Nonetheless, Cooper's successor, Dr. Zamudio, indicates that there are still significant resource constraints. Despite Cooper's recruitment efforts, Nogales still must rely on some long-term substitutes, rather than upon permanent teachers. Other teachers have been "emergency-certified" and so have not been trained according to Arizona's standards. NUSD's

starting base pay of $28,500 per year, which is below the statewide average, makes it difficult to recruit the fully-qualified teachers that NUSD needs. The recruitment challenges mean that Dr. Zamudio has been unable to reduce student/teacher ratios further, to 15:1, which, both he and a defense expert testified, would significantly enhance English learning success. He would also like to be able to hire trained teacher's aides, who would be helpful in ELL programs, for the lower grades but has been unable to do so because of resource limitations.

The limits of NUSD's progress, even as it has improved its ELL programs, are apparent in the AIMS test results and reclassification test results introduced at the hearing, which show the same problems that appear in the statewide data. The test results, we caution, have the same limitations that we have discussed at the state level, and cannot be read unequivocally to demonstrate that ELL programs are failing in NUSD because we lack longitudinal data on the performance of student cohorts who began as ELL students and who may or may not have been reclassified. It is fair to say, however, that the indications provided by the test data largely do not point in positive directions.

For instance, while it is clear that NUSD has reclassified many students, it is not clear how much of this success can be attributed to genuine academic progress and how much to changes in its classification methodology. During the 1999-2000 school year, there were 5,104 ELL students. The next year saw

similar numbers, but between the 2001-02 and the 2003-04 school years, the number of such students hovered around 3800. Then, when Arizona implemented a new testing protocol (which was later concluded to be reclassifying too many students and replaced), the ELL population declined to about 3200 students in the 2004-05 school year and to 2474 the next year. In 2006-07 a new, reputedly more accurate and more difficult to pass test came into use, and Dr. Zamudio testified that he expects ELL student numbers to increase again.

Because of these shifts in reclassification methodology, the meaning of "ELL" changed over time. Comparison of AIMS test data for ELL students and non-ELL students over time are therefore not reliable. But, as some patterns persist, we can point to several general trends based on AIMS test results for the 2003-04, 2004-05, and 2005-06 school years.[23]

First, within NUSD, ELL students in lower grades are doing substantially better than ELL students in higher grades. In 2005-06, for instance, while only 27% of ELL third graders failed[24] math,

---

[23] Although the patterns we describe are consistent from year to year, passage rates varied somewhat from year to year. They rose from 2003-04 to 2005-05 but fell again in 2005-06. One of the defense witnesses suggested that the high 2004-05 passage rates could be related to problems with the reclassification system.

[24] AIMS is graded on a four-part scale. Students may "fall far below" the passing score, "approach" but not meet the standard, "meet" the standard, or "exceed" the standard. When

(Continued on following page)

76% of ELL tenth graders failed. ELL third graders failed reading 37% of the time; 78% of ELL tenth graders failed. And 35% of ELL third graders failed writing, while 76% of ELL tenth graders failed.

Second, ELL students in NUSD generally do worse than the state average score for all students (ELL and non-ELL). Only students in the lower grades sometimes reached or beat the average. Older students are falling far behind. For tenth graders in 2005-06, for instance, only 36% failed math statewide, but 76% of ELL tenth graders in NUSD did. For reading, the tenth grade state failure rate was 29%, while the tenth grade ELL failure rate in NUSD was 78%. And for writing, the state tenth grade failure rate was 36% and the NUSD tenth grade ELL failure rate was 76%.

Third, within NUSD, ELL students are still falling behind the district average for all students. Again, the gap grows more pronounced in higher grades. In 2005-06 in third grade, ELL students failed math at a 27% rate, reading at a 37% rate, and writing at a 35% rate, rates that were not too much worse than the district averages of 22%, 29%, and 30%, respectively. By tenth grade, however, ELL students failed math at a 76% rate, reading at a 78%

---

we refer to the percentage of students "failing," we mean those who either "fell far below" or only "approached" the state passing score.

rate, and writing at a 76% rate, far worse than the district averages of 50%, 42%, and 39%, respectively.

The picture, then, is of relative success at lower grades (although not equal to that of English speaking students *within* NUSD), and increasing failures for older students, a significant majority of whom are failing the state's basic achievement tests.

Federal performance classifications under NCLB generally correspond with this portrait: In 2004-05, one of Nogales' two middle schools failed to meet its adequate yearly progress goals under NCLB, as did the alternative high school. In 2005-06, the same middle school was under a restructuring plan, and corrective action was being taken in the alternative high school. The main high school had been given a warning, as had a lower-performing elementary school.

In a survey of the test results of ELL students statewide, NUSD students' performance was also consistent with this general snapshot. This survey, commissioned by Arizona's Department of Education, reported the 2005 test results of students who were classified as ELL in 2003 and ranked schools by the average AIMS scores of these students.[25] Some, but

---

[25] No effort was made to verify that a given student was still ELL or that he or she had remained in ELL programming for the two intervening years. Nor are test scores available for these students in 2003. The result is that the survey data does not present a longitudinal survey of the progress of students who remained in ELL programs for that period. Nor is the data of

(Continued on following page)

not all, of NUSD's younger ELL students did very well. Four NUSD elementary schools ranked in the top ten schools in the state by this measure, with passage rates of over 70%. Two other elementary schools fared more poorly, ranking 41st and 152nd, with passage rates of about 60% and about 50%, respectively. Middle school performance was lower – one tied for 165th place, also with about a 50% passage rate, and the other ranked 409th, with only about 40% of its ELL students passing the test. The high schools are at the bottom of the heap. The main high school ranks 575th, with a 28.37% overall passage rate and Santa Cruz Alternative High School is four from the bottom at 625th place and a 8.62% passage rate.

Finally, there is at least one clear bright spot: For all grades in 2005-06, *reclassified* ELL students were doing about as well as native English speakers, which is a notable accomplishment, and which suggests that the ELL programs may well benefit those who successfully transition out of them. But, as the data on such scores does not track individual students, showing when they passed through ELL programs and how long it took them to do so, and because the

---

value in demonstrating that NUSD's ELL students are doing better relative to non-ELL students, as non-ELL students' performance was not measured or ranked. More importantly, if, as Flores alleges, Arizona systematically underfunds ELL programs statewide, comparing one allegedly underfunded district with another does not show that funding in any given district is adequate.

reclassification methodology continues to shift, this bright spot does not offset the otherwise troubling ELL test data. On the data available, it is possible that some high achievers may rapidly be leaving ELL programs while other students continue to struggle, never achieving at the same levels as non-ELL students. Indeed, Dr. Zamudio testified that reclassification in NUSD takes, *on average,* four to five years and the district court so found. The encouraging success of reclassified students is therefore of limited significance with regard to the overall impact of NUSD's ELL program.

b. Funding

NUSD estimates its per pupil incremental costs for ELL programming for the 2005-06 school year at $1570.42, over three times the Group B level weight funding Arizona provides for ELL programs under either HB 2010 or HB 2064. NUSD has been able to finance the improvements it has made by seeking grants, diverting state base level funding away from other purposes, and passing county-level budget overrides.

Of the $1570.42 per pupil that NUSD indicates it spends on ELL programming, over half this amount, $824.25, is drawn from the district's maintenance and operations account (which includes both the ELL Group B funds and base level support funding). As this amount is well above the Group B weights, it indicates that NUSD is dipping into funds that would

otherwise be used to fund basic educational purposes. Federal funds add about $484.05 per student, but most of these funds are earmarked for at-risk, low-income students, rather than ELL students (although the two groups overlap). Another $43.43 per student comes from county override funds. The remaining $218.69 per student comes from a variety of state, federal, and local funding sources and grants.

NUSD's budget has increased over the years, but ELL-specific funds have been a relatively small part of that increase. A schematic break-down of the budget over the relevant period, which does not appear to include the relatively small amount of funding from the county, was entered into evidence before the district court. We reproduce a somewhat modified version of that table here. The break-down shows *all* funds available to ELL students, including funds that are not ELL-specific. ELL-specific funding sources are labeled as such, and the total amount of ELL-specific funding is separately recorded:

	1999-2000	2000-2001	2001-2002	2002-2003	2003-2004	2004-2005	2005-2006	2006-2007
Base level state funds	$2,592	$2,618	$2,721	$2,788	$2,858	$2,929	$3,039	$3,173
Group B	$156	$157	$163	$321	$329	$337	$349	$444[26]

[26] This amount is based on HB 2064's Group B weight increase. If that portion of HB 2064 does not go into effect, the figure will be $364.86.

	1999-2000	2000-2001	2001-2002	2002-2003	2003-2004	2004-2005	2005-2006	2006-2007
ELL funds								
Other state ELL funds	$0	$0	$0	$126	$83	$64	$0	$74
Federal Title I funds	$439	$448	$467	$449	$487	$638	$603	$597
Federal Title II funds	$58	$63	$74	$101	$109	$91	$92	$87
Federal Title III (ELL) funds	$0	$0	$0	$67	$89	$114	$118	$121
Other state and federal grants	$58	$56	$59	$47	$207	$214	$205	$109
Total of all funds	$3,302	$3,342	$3,484	$3,899	$4,162	$4,387	$4,406	$4,605
Total ELL funds	$156	$157	$163	$514	$501	$515	$467	$639

In sum, as this table suggests, ELL-specific funds have never covered all ELL programming costs. NUSD can pay the incremental cost of its ELL programs only by diverting non-ELL-specific funds for that purpose, and the district was able to do that at the time of the Declaratory Judgment, as now. These ELL-specific funds, however, have increased, due largely to the rise in Group B weights occasioned by HB 2010 in 2002-03 and will increase again due to HB 2064 if the new Group B weight goes into effect. There remains, however, a fundamental mismatch between the ELL costs NUSD requires and the funds provided for that specific purpose.[27]

c. Conditions in Other Districts

NUSD's reported incremental costs for ELL programming, and its need to divert other funds to cover them, are generally consistent with the experiences of districts across Arizona. District officials testifying at the hearing reported incremental costs ranging from $1,077 per student to $4,072 per student. All of these districts are funding their programs by diverting funds from other sources, often by using additional taxes that they are allowed to levy for use

---

[27] We note that, for a variety of contractual and statutory reasons, and to ensure a fiscal cushion, NUSD carries over some portion of its budget every year, including some funds that it might otherwise spend on ELL programming or other needs. That practice, rooted in careful fiscal planning, does not indicate a surplus of funds for educational needs.

in desegregation programs.[28] Group B weights, alone, are not generally sufficient to fund ELL programs.

Testimony from officials in other districts confirms that reclassification regularly takes longer than two years for many students. The average reclassification time in the Tucson Unified School District, for instance, is 4.6 years. In the Murphy Elementary School District, nearly two-thirds of ELL students took more than four years to be reclassified. Similarly, in the Scottsdale Unified School District, the majority of ELL students take more than two years to be reclassified, and in the Glendale Union High School District, 46% of ELL students at one school and 15% of ELL students at another had been in ELL programs for more than two years. No district submitted evidence showing that all of its ELL students had been reclassified within two years.

---

[28] A broader survey of school district officials conducted for Flores by Dr. Chuck Essigs of the Arizona Association of School Business Officials yielded similar results. Dr. Essigs did not independently verify his survey results or ensure that responding districts used a common cost reporting system. As these results vary widely (from $351 to $3,874), neither we nor the district court rely much upon them. It is worth noting, nonetheless, that, for the fourteen surveyed districts with over 1,000 ELL students, incremental costs in 2006-07 in all but one were above $1,000, with most of the districts' incremental costs in the range between $1,000 and $2,000.

G. The Ruling on Remand

After the evidentiary hearing at which the facts concerning the current status of ELL students and ELL funding were presented, the district court again denied relief from judgment. *Flores v. Arizona,* 480 F.Supp.2d 1157, 1167 ("*Flores XI*") (D.Ariz.2007).

The court held that the improvements at NUSD do not establish that Arizona is fulfilling its duty to fund ELL programming rationally. *Id.* at 1160, 1166. Most of these improvements, the court found, are due to NUSD's own management improvements, not to reliable or sufficient funding. *Id.* at 1160. And the improvements are limited: NUSD's ELL high school students, in particular, are still falling well behind its non-ELL students, and even the successes will be "fleeting at best" unless Arizona meets its funding obligations. *Id.* Thus, although NUSD is "doing substantially better," *id.,* and the state has developed a significantly improved infrastructure for ELL programming, "mere amelioration of those specific conditions" cited as examples of the funding shortage in the Declaratory Judgment, is "inadequate" to justify relief: "Rather, compliance would require a funding system that rationally relates funding available to the actual costs of all elements of ELL instruction." *Id.* at 1165.

The district court went on to determine that the Superintendent and the Legislative Intervenors had not demonstrated that such a system was in place. The court decided that HB 2064 does not sufficiently

address the inadequacies of Arizona's ELL funding system and, in fact, introduces new problems. In so holding, the district court reasoned as follows: HB 2064's increase in Group B weights is inadequate, as "the per-student incremental cost of providing ELL instruction is greater than either the current Group B weight of $365 [set by HB 2010] or the increased weight of $444 that would be provided if [the c]ourt approved HB 2064, both in NUSD and in other districts." *Id.* at 1162. HB 2064's two-year cut-off of that funding would suddenly, and irrationally, further underfund school districts. *Id.* at 1166. The HB 2064 grant programs, which might have linked funding rationally to costs, are no better. The Arizona structured English immersion fund suffers from the same irrational two-year cut-off, *id.* at 1163, and both it and the compensatory instruction fund violate provisions of federal law that bar taking federal funds into account in making state funding decisions and bar supplanting existing state funding with federal monies. *Id.* at 1166.

The district court concluded that, without a rational funding system for ELL incremental costs, Arizona remains out of compliance with the EEOA, despite some successes in NUSD:

> On January 24, 2000, this Court held that the State's minimum funding level for ELL programs was arbitrary and capricious and bore no rational relation to the actual funding needed to insure that ELL students could achieve mastery of the State's academic

> standards. . . . More than 7 years later, circumstances in this regard remain the same. The Moving Parties have not shown compliance with this Court's decree, much less changed circumstances that would warrant modification or dissolution of this Court's order.

Id. at 1167. The district court gave Arizona until the end of the then-current legislative session to comply. *Id.* The Legislative Intervenors and the Superintendent timely appealed.[29]

II. ANALYSIS

A. Standard of Review and Jurisdiction

Rule 60(b)(5) provides that "[o]n motion and just terms, the court may relieve a party . . . from a final judgment . . . [when] the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable."[30]

---

[29] After Arizona failed to comply with the district court's order in *Flores XI*, the court again found the state to be in contempt on October 10, 2007. *See Flores v. Arizona*, No. CV-92-596 ("*Flores XII*") (D.Ariz.2007). The present compliance deadline is March 4, 2008. *Id.* at 4. The contempt order has been separately appealed and is not before us. We do, however, discuss it below in Part II(C)(2) for the light it sheds on the adequacy of HB 2064.

[30] Amendments to the Federal Rules of Civil Procedure designed to clarify but not to make any substantive changes

(Continued on following page)

The first two circumstances do not obtain here: Although the moving parties argue that Arizona has achieved the purposes of the judgment through actions other than those required by the Declaratory Judgment and the ensuing orders, Arizona has in fact not "satisfied" the prior judgment, as it has not complied with its terms. And there is no pertinent earlier judgment that has been reversed or vacated. Instead, the moving parties are, in practical terms, contending that it "is no longer equitable" to apply the judgment and the present injunction prospectively.

It is appropriate to grant a Rule 60(b)(5) motion for this reason when "the party seeking relief from an injunction or consent decree [meets its initial burden by showing] 'a significant change either in factual conditions or in law.'" *Agostini v. Felton,* 521 U.S.

---

became effective on December 1, 2007. *See* Joseph Kimble, *Guiding Principles for Restyling the Federal Rules of Civil Procedure (Part I),* 84 MICH. BAR J 56 (SEPT.2005). We quote the current version of the rule, although the district court ruled based on the prior version. The prior version provided that:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding [if] . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

We find no relevant distinction between the two formulations.

203, 215, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (quoting *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367, 384, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992)); *see also Bellevue Manor Assoc. v. United States,* 165 F.3d 1249, 1255 (9th Cir.1999) ("*Rufo* sets forth a general, flexible standard for all petitions brought under the equity provision of Rule 60(b)(5)."). Once that showing is made, modification may be warranted "when changed factual conditions make compliance with [a consent decree or an injunction] substantially more onerous," when a decree or injunction "proves to be unworkable because of unforeseen obstacles[,] or when enforcement of the decree without modification would be detrimental to the public interest." *Rufo,* 502 U.S. at 384, 112 S.Ct. 748 (citations omitted); *see also SEC v. Coldicutt,* 258 F.3d 939, 941-42 (9th Cir.2001) (using this standard). Finally, modification is necessary if a consent decree or injunction "become[s] impermissible under federal law." *Rufo,* 502 U.S. at 388, 112 S.Ct. 748; *see also Agostini,* 521 U.S. at 215, 117 S.Ct. 1997 (same).

We review district courts' rulings on motions for relief from judgment under Rule 60(b) for abuse of discretion. *United States v. Asarco Inc.,* 430 F.3d 972, 978 (9th Cir.2005). "We may not reverse a district court's exercise of its discretion unless we have a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached upon weighing the relevant factors." *Coldicutt,* 258 F.3d at 941. In this context, "[a] district court abuses its discretion if it does not apply the

correct law or if it rests its decision on a clearly erroneous finding of material fact." *Asarco,* 430 F.3d at 978.

We emphasize that our task in this context is a limited one: We do not sit to retry the case, nor to reexamine unappealed legal determinations, and do not have jurisdiction to do so. "[T]he timely filing of a notice of appeal in a civil case is a jurisdictional requirement," *Bowles v. Russell,* ___ U.S. ___, 127 S.Ct. 2360, 2366, 168 L.Ed.2d 96 (2007), and "[b]ecause the time for appeal ha[s] passed in this case, the interest in finality must be given great weight." *Ashford v. Steuart,* 657 F.2d 1053, 1055 (9th Cir.1981). We have cautioned against the use of provisions of Rule 60(b) to circumvent the strong public interest in timeliness and finality served by Rule 4(a). *See In re Stein,* 197 F.3d 421, 425-26 (9th Cir.1999). Simply put, motions for relief from judgment may not be used to remedy a failure to contest in the first instance the legal rulings underlying the judgment itself.[31]

---

[31] The Legislative Intervenors cite to a pre-*Agostini* Sixth Circuit case, *In re Detroit Auto Dealers Ass'n, Inc.,* 84 F.3d 787, 790 (6th Cir.1996) for the proposition that a "party should be entitled to modification whenever the original decree could not properly have been issued on the state of facts that now exists." This sentence, in turn, is drawn from a decades-old student note, *Developments in the Law-Injunctions,* 78 HARV. L.REV. 994, 1082 (1965), which was prescribing changes in the then-current law, not describing the state of the law.

(Continued on following page)

Our review is somewhat closer in the context of institutional injunctions against states "due to federalism concerns" implicated by such injunctions. *Hook v. Arizona Dep't of Corr.*, 107 F.3d 1397, 1402 (9th Cir.1997). In such contexts, "[w]e scrutinize the injunction closely to make sure that the remedy protects the plaintiffs' federal constitutional and statutory rights but does not require more of state officials than is necessary to assure their compliance with federal law." *Clark v. Coye*, 60 F.3d 600, 604 (9th Cir.1995); *see also Hook*, 107 F.3d at 1402. Nonetheless, "we will defer to the district court so long as any injunctive relief it provides remains within these parameters," *Clark*, 60 F.3d at 604, and the burden of proof remains on the moving party. *Hook*, 107 F.3d at 1402; *Rufo*, 502 U.S. at 383-84, 112 S.Ct. 748. Additionally, federalism concerns are substantially lessened here, as the state of Arizona and the state Board of Education wish the injunction to remain in place.

The Superintendent and Legislative Intervenors also question the district court's compliance with our mandate on remand and the propriety of several evidentiary rulings. "This court reviews de novo a

---

To comport with modern law, and particularly with the final nature of unappealed judgments, the language must be read to mean that relief is appropriate when the "original decree could not properly have been issued on the state of facts that now exists *applying the legal framework used by the original unappealed judgment.*" Otherwise, such a rule would invite relitigation of settled judgments using Rule 60(b) as a vehicle, a use which, as noted, is improper.

district court's compliance with the mandate of an appellate court." *United States v. Perez,* 475 F.3d 1110, 1112 (9th Cir.2007) (citations and alterations omitted). With exceptions not pertinent here, "we generally review the district court's ruling on a motion *in limine* only for an abuse of discretion." *United States v. Ross,* 206 F.3d 896, 898 (9th Cir.2000).

Finally, the parties dispute each others' standing. The Legislative Intervenors, first, contend that Flores lacks standing to argue that HB 2064 does not represent a change in circumstances sufficient to warrant relief. The Legislative Intervenors are wrong: HB 2064 holds itself out as a remedy for Flores and was presented to the court by Arizona and by the Superintendent and Legislative Intervenors as such. Whether or not Flores would have had standing to challenge HB 2064 in the first instance, she certainly has standing to argue that a purported remedy will not satisfy a judgment in her favor.

Second, Flores challenges the standing of the Superintendent because he does not make the funding decisions at the core of this case. As to that basis for disputing the Superintendent's standing, Flores is wrong. The Superintendent does not, it is true, write school funding laws, but he does administer the state's education system, including the HB 2064 grant system, *see* ARIZ.REV.STAT. § 15-251, and obviously has a vital interest in whether or not funding for the programs he oversees is EEOA compliant. He is a named defendant in the case; the Declaratory Judgment held him to be in violation of the EEOA,

Flores II, 172 F.Supp.2d at 1239-40, and the current injunction runs against him.[32] That judgment against him may not be essential to relief does not mean that he lacks standing to contest an order running against him.

The Superintendent's standing is, however, for a different reason, fairly tenuous. He is "[s]ubject to supervision by the state board of education" with regard to distributing monies to local schools, and must "[e]xecute, under the direction of the state board of education, the policies which have been decided upon by the state [B]oard." ARIZ.REV.STAT. § 15-251(3), (5). It appears that the Superintendent, by filing the motion to vacate the judgment, by pursuing this appeal, by maintaining that ELL-specific funding does not matter to the success of ELL education in Arizona, and by seeking to derail any additional ELL-specific funding in Arizona, is not carrying out "the policies which have been decided upon by the state board," which this litigation suggests are directly to the contrary in all regards. Moreover, the Superintendent's standing is limited to defending against the judgment and injunction as they run against him. The other defendants are not seeking relief from the

---

[32] That the injunction may be enforced against the Superintendent is indicated by the current civil contempt order which orders him to "use [his] best efforts within the power granted to [him] . . . to ensure compliance with the March 22, 2007 Order [*Flores XI*] by March 4, 2008." *Flores XII,* No. CV-92-596 (D.Ariz. October 10, 2007).

judgment and orders, and the judgment and orders against the remaining defendants can be given full effect without running against the Superintendent, as the state Board of Education can order him to comply.

The state Board of Education, however, is obviously fully aware of the actions the Superintendent has taken in this litigation. There has been no suggestion that it has ordered him to drop his motion or this appeal, or to conform his position to that of the board, although it may well be that it could do so. Given that vacuum, we have no basis for determining on the present record that the Superintendent is acting outside his authority in bringing his motion and pursuing this appeal. We will not substitute our judgment for that of the state Board, which better knows its own policy determinations and can choose when to exercise its supervisory authority. We do observe, however, that the current structure of this litigation is placing the federal judiciary in the uncomfortable position of mediating between state officials with regard to the execution of an obligation of the state as a whole. It would be vastly preferable for the state to work out through its own political structure a consistent position and approach.

Despite these concerns and although the issue is exceedingly close, we conclude that the Superintendent does have standing to maintain his Rule 60(b)(5) motion and this appeal, but note that the result had he succeeded would have been to vacate the judgment and injunction only as they run against him.

Third, Flores challenges the standing of the two Legislative Intervenors, as they speak only for themselves and do not represent the legislature as a whole, have no judgment against them, and no apparent direct interest in the judgment outside of an abstract policy interest. We need not decide this question, although the extent and degree of the standing of individual legislators under these circumstances is in very serious question. *See Raines v. Byrd,* 521 U.S. 811, 829, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997). Parties need not have standing to intervene in our circuit, *see State of California Dep't of Soc. Servs. v. Thompson,* 321 F.3d 835, 846 n. 9 (9th Cir.2003), although they must have standing to appeal, *see Diamond v. Charles,* 476 U.S. 54, 68, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986). Because the Superintendent does have standing and also appealed, we would not lose jurisdiction over this appeal even if the Legislative Intervenors did not have standing.

B. Evidentiary Issues

Preliminarily, we briefly address evidentiary issues arising from the hearing. The Legislative Intervenors contend that the district court erred by admitting (1) evidence of ELL costs outside NUSD; (2) evidence of non-incremental costs; (3) the testimony of Flores' expert on federal education funding law; and (4) the NCSL study, the Staffers' study, and Dr. Essigs' study. We find no abuses of discretion.

First, because Arizona never complied with the district court's earlier orders to prepare and adopt a cost study, the district court was right to look to whatever reliable evidence of ELL programming costs was available so as to better understand and assess the costs in NUSD. The experiences of other districts helps to establish what incremental costs for ELL programs are likely to be, the variability in those costs, and various ways of delivering the programs. Admitting such evidence was not an abuse of discretion.

Likewise, we find no abuse of discretion with regard to admitting evidence of "non-incremental" costs. The Legislative Intervenors contend that some of the costs identified by NUSD and other districts do not fit within HB 2064's definition of "incremental costs." It is not at all clear why that particular definition should control at the hearing, as HB 2064's adequacy as a whole was and is in question. In any event, although the Legislative Intervenors may disagree about how costs were measured, they had ample opportunity to challenge cost figures at the hearing, and took that opportunity.

Third, we find no abuse of discretion with regard to the expert testimony on federal educational funding law. It is true that "matters of law" are generally inappropriate subjects for expert testimony, *Aguilar v. Int'l Longshoremen's Union Local No. 10,* 966 F.2d 443, 447 (9th Cir.1992), but there may be "instances in rare, highly complex and technical matters where a trial judge, utilizing limited and controlled

mechanisms, and as a matter of trial management, permits some testimony seemingly at variance with the general rule." *Nieves-Villanueva v. Soto-Rivera,* 133 F.3d 92, 101 (1st Cir.1997). In this hearing, which was, in large part, an inquiry into education law and policy, the expert testimony may well have been helpful. It was, in any event, not prejudicial in this bench trial, where there was no danger that a jury might give too much credence to a legal expert. *See id.* at 99.

Finally, we find no abuse of discretion with regard to the admission of the three cost studies.[33] The NCSL study, conducted by an expert research agency and based on expert opinion is certainly not unreliable under the standards set by *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and extended by *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). To the extent that one portion of the study – its survey of Arizona schools – had a low response rate, the study notes the deficiency and cautions against giving that portion too much weight. There was no error in admitting it.

The Staffers' study, which was prepared as a partisan advocacy document by non-experts, and Dr.

---

[33] Flores argues that two of the studies are admissible under the public records exception to the hearsay rule, Fed.R.Evid. 803(8). That point is not clear, but we do not decide the question, as there was no prejudice resulting from their admission.

Essigs' survey, which did not use any form of verification and appears to have been an entirely informal email survey, are more questionable. But even if there was error here, the Legislative Intervenors were not prejudiced. As a general matter, "in a bench trial, the risk that a verdict will be affected unfairly and substantially by the admission of irrelevant evidence is far less than in a jury trial." *E.E.O.C. v. Farmer Bros. Co.*, 31 F.3d 891, 898 (9th Cir.1994). So, too, for potentially unreliable evidence. Given that the two studies are largely duplicative of other properly admitted evidence, and given the facial deficiencies of HB 2064, we cannot say that the outcome of the hearing would have been any different had the two studies not been admitted. There is no reversible error here, so we turn to the merits.

C. Is Relief from Judgment Warranted?

This case is unusual in that the Superintendent and Legislative Intervenors (1) did not appeal from the original judgment holding that Arizona's funding system for ELL programs was in violation of the EEOA; (2) did not appeal from the injunctions issued to remedy that violation; and (3) argue only in the alternative that HB 2064, which defines Arizona's ELL funding system, demonstrates actual compliance with the Declaratory Judgment and so warrants relief. The Legislative Intervenors maintain that Arizona is in compliance "with or without" HB 2064, and the Superintendent similarly maintains that the statute is "irrelevant."

As to the third point, both the Superintendent and the Legislative Intervenors argue that the district court should not have considered HB 2064's legality on remand.[34] They instead primarily argue that neither we, nor the district court, need look to HB 2064 at all. In their view, conditions have so changed as to make the Declaratory Judgment's emphasis on developing a cost-linked ELL funding structure irrelevant and so render it inequitable to require the state to do so.

Our previous Rule 60(b) cases generally deal with requests for modification due to changed circumstances that rendered compliance more onerous, *see Asarco,* 430 F.3d at 975-76; *Bellevue Manor Assoc.,* 165 F.3d at 1250-52, or due to actual compliance, *see Coldicutt,* 258 F.3d at 941-43. The moving parties here, instead, urge us to look away from Arizona's attempt to comply – HB 2064 – and turn instead to other factors – a generalized increase in state funding, changes in the management of NUSD, and passage of the No Child Left Behind Act of 2001. These changes, they urge, sweep away the foundations of the prior rulings and so justify relief from them.

As a general matter, there are some instances, likely rare, in which a prior judgment is so undermined by later circumstances as to render its continued

---

[34] In contrast, their original motion for relief from judgment relied heavily upon HB 2064 as grounds for relief.

enforcement inequitable even though neither appealed nor complied with. *See, e.g., Rufo,* 502 U.S. at 383-85, 112 S.Ct. 748. Such circumstances are not present here, however, nor do we think it proper to reward Arizona's foot-dragging by granting relief from judgment on grounds that could have been raised on appeal from the Declaratory Judgment and from earlier injunctive orders but were not. Further, HB 2064 is among the most significant changes in ELL education and finance in the state since the Declaratory Judgment issued and so must be examined to determine whether it constitutes compliance with the district court's orders.

We now discuss the arguments for relief in turn, beginning with the novel proposition that the judgment need no longer be complied with and then turning to whether Arizona *has* complied.

1. Whether Compliance is Still Equitable

The core premise of the Declaratory Judgment is that Arizona is "violating the EEOA because [its] arbitrary and capricious *Lau* appropriation is not reasonably calculated to effectively implement the *Lau* educational theory which it approved, and NUSD adopted." *Flores II,* 172 F.Supp.2d at 1239. The central idea, then, is that ELL programs impose costs additional to those generated by ordinary school activities, *id.* ("The State's minimum base level for funding *Lau* programs. . . . bears no relation to the

actual funding needed. . . ."), and that, in the absence of such state support, ELL programs would necessarily be inadequate.[35] The district court listed six deficiencies generated by inadequate resources in 2000. Because many of these specific problems have been solved by better management in NUSD, and because school funding has generally increased, the Superintendent and Legislative Intervenors argue that the judgment has effectively been satisfied.[36] We review these arguments; it is not, however, our task to retry the case. The district court should be affirmed unless it has clearly erred on the record before it in its factual findings or otherwise has abused its discretion.

---

[35] That premise has been repeated and amplified in a host of similarly unappealed post-judgment relief orders. *See, e.g., Flores VII,* No. CV-92-596 at 5 (D.Ariz. January 28, 2005); *Flores VI,* No. CV-92-596 at 2 (D. Ariz. June 12, 2002); *Flores III,* 160 F.Supp.2d at 1044.

[36] The Superintendent and Legislative Intervenors also argue that NUSD must have solved its problems because district officials signed a federal grant application that contains a boilerplate assurance that it is in compliance with all state and federal laws and regulations. First, whether NUSD is in compliance is not the issue; NUSD is not a defendant. Arizona is, so the question is whether *Arizona* is in compliance. It is true that the state also submitted a rote assurance of compliance with federal law (although no party relies upon it), but we cannot say that the district court was obliged to accept such boilerplate, generalized statements as true, or that the unsubstantiated statements make the district court's considered determination that NUSD still has problems, based on district-specific data, clear error.

NUSD should not be penalized for doing its best to make do, despite Arizona's failure to comply with the terms of the judgment. Granting relief would absolve the state from providing adequate ELL incremental funding as required by the judgment. The judgment determined that the state has not provided adequate resources to support NUSD's ELL programming, as required by the EEOA. We cannot now decide anew the unappealed Declaratory Judgment, nor the many post-judgment orders so holding. As we have explained, the provisions of Rule 60(b) may not be applied to "derogate from the purpose and effect of Rule 4(a)." *In re Stein,* 197 F.3d at 425. The legal determinations made in the Declaratory Judgment were unappealed and are now final.

Underlying the Declaratory Judgment and post-judgment orders is the basic determination under the EEOA that, given Arizona's educational funding structure, ELL programs require substantial state funding in addition to that spent on basic educational programming. That conclusion rests, in turn, on the recognition that ELL students require additional attention to bring their language skills to the point where they can fully benefit from instruction in English.

To prevail on their argument, then, the Superintendent and Legislative Intervenors needed to show either that the basic factual premises of the district court's central incremental funding determination had been swept away, or that there has been some *change* in the legal landscape that makes the original

ruling now improper. It will not suffice to argue for vacating the judgment because of factual or legal circumstances that have not changed the basic premises of the original rulings.

a. Changes in Fact

We begin with the moving parties' attempt to make the first, fact-based showing – that the factual circumstances have so shifted as to sweep away the unappealed incremental funding determination. To succeed on this ground, given the original ruling, they were required to demonstrate either that there are no longer incremental costs associated with ELL programs in Arizona or that Arizona's "base plus incremental costs" educational funding model was so altered that focusing on ELL-specific incremental costs funding has become irrelevant and inequitable.

Turning, then, to the first possibility, we cannot find that the district court clearly erred when it found, consistent with the basic premises of this litigation, that in 2007, as in 2000, "ELL students need extra help and that costs extra money." *Flores XI*, 480 F.Supp.2d at 1161. At the evidentiary hearing, all witnesses agreed that ELL students face unique challenges which require school districts to invest substantially in teacher training, materials, monitoring, and assessment efforts. If anything, after 2000, when Arizona moved away from bilingual education and required most courses to be taught in English, regardless of students' language abilities, these

challenges have become greater: A tenth grader, for example, who speaks no English but must pass a biology course taught entirely in English will require considerable assistance. The recent statewide program to improve ELL testing, monitoring, and support programs also imposes incremental costs on school districts.

Nor did the district court err when it determined that "the per-student incremental cost of providing ELL instruction is greater than either the current Group B weight" of about $340 per student or the roughly $450 per student that would be provided were HB 2064's provision on Group B weights to be approved. *Id.* at 1162. As the Superintendent and Legislative Intervenors observe, Superintendent Cooper's management changes did ameliorate many of the specific examples of resource shortages that the district court identified in 2000. They did not, however, result in such success as to call into serious question NUSD's need for increased incremental funds. NUSD's own cost study, along with evidence from other districts throughout Arizona, placed estimated incremental costs at well over $1000 per student. The expert panels consulted in the NCSL study similarly recommended spending over $1000 per student, and, in some cases, recommended spending over $2000 per student. The NCSL's school district survey reported *actual* per student spending as in the $600 range but cautioned that that figure might be an underestimate. The SjobergEvashnek study reported that actual expenditures in NUSD

shortly after the Declaratory Judgment were in the $300 per student range but also noted that its estimate was likely low. Taken together, these studies provide very strong support for the proposition that the incremental costs of a compliant program not only exceed the Group B weights, either as presently set or as provided by HB 2064, as the district court concluded, but in fact likely exceed $1,000 per student, both in Nogales and statewide.[37]

The Superintendent and Legislative Intervenors nonetheless maintain that the improvements in ELL achievement in NUSD demonstrate that additional incremental funding is no longer required. To the contrary, the data from NUSD supports our conclusion that the district court did not abuse its discretion in holding otherwise.

As Dr. Zamudio testified, resource constraints remain: NUSD *still* cannot afford to pay market rate salaries to attract the teachers it needs to reduce class sizes to levels more conducive to ELL education, nor can it hire qualified teacher's aides for the lower grades. That these constraints matter is apparent

---

[37] Arizona's ineffectiveness in ascertaining costs has made the question of costs more difficult to answer than it might have been. Because the state's efforts to gather cost study data were incomplete-the SjobergEvashnek study was inconclusive and the NCSL study was repudiated by the legislature, *see* HB 2064 § 13(C)-the precise incremental costs of ELL programming are not known and we and the district court must rely on what evidence is in the record from the various cost studies and from NUSD and other districts.

from the persistent achievement gaps documented in NUSD's AIMS test data. As we discussed at length above, ELL students in NUSD continue to fall behind their native-English-speaking counterparts, both statewide and within the district. These gaps grow in the higher grades, as the district court found, and are disturbingly large. Although, as we have noted, the data is limited, the burden here is on the moving parties to prove the factual changes on which they premise their motion to vacate the judgment. *See Asarco,* 430 F.3d at 979. We cannot say that the district court clearly erred when it found this burden was not met. A district in which the *majority* of ELL tenth graders fail to meet state achievement standards while the majority of native English speakers pass is not one whose performance demonstrates that the state is adequately funding ELL programs and so warrants relief from judgment.[38]

The Superintendent and Legislative Intervenors respond, essentially, that even if ELL programming

---

[38] That *reclassified* students in the 2005-06 school year do about as well as native English speakers, however, is encouraging, and may suggest some degree of success, as does the increase in reclassification rates in NUSD. But because the reclassification standard has repeatedly changed and because the record indicates that reclassification takes many years, the record does not demonstrate that NUSD is succeeding in rapidly and permanently reclassifying ELL students, nor on the time it takes to reclassify students. On the current record, we certainly cannot say that the encouraging data on the scores of reclassified students and on reclassification rates is sufficient to have rendered the district court's findings clearly erroneous.

costs do exceed ELL-specific funding, there is ample state funding to cover them. They argue, in other words, that focusing solely on ELL-specific funding, and on the Group B weights in particular, is no longer appropriate given general increases in education funding since 2000.[39] Such a focus, they contend, mistakes "the details, even the minutiae, of the intermediate methodologies the court has devised" to reach compliance for compliance itself. *Glover v. Johnson,* 138 F.3d 229, 233 (6th Cir.1998).[40] With this argument, the Superintendent and Legislative Intervenors seek to reopen matters made final when the Declaratory Judgment was not appealed. The EEOA provides that states must not "deny equal educational opportunity . . . by . . . the failure by an educational

---

[39] They also point to the increased institutional support, such as new training and monitoring programs, now provided by the state. That support is of limited relevance, as the need to establish monitoring and training programs was set out in the *Flores* consent decree. That Arizona may have satisfied the decree, which dealt with issues not included in the Declaratory Judgment, does not mean that the Judgment has also been satisfied.

[40] In *Glover,* a district court overseeing an original judgment ordering parity in the treatment of prisoners regardless of gender was holding the defendants to finely-tuned compliance plans that specified, with great detail, conditions in the prisons. *Id.* at 233-36. The Sixth Circuit vacated a round of contempt sanctions arising from violations of these plans, emphasizing that the goals of the underlying judgment was simply to fix the underlying gender discrimination and end judicial involvement and warning against "judicial micromanagement." *Id.* at 241, 245. As we develop, *infra,* such micromanagement is not at issue here.

agency to take *appropriate* action to overcome language barriers that impede equal participation." 20 U.S.C. § 1703(f) (emphasis added). Diverting base level funds – thereby hurting all students in an attempt to equalize opportunities for ELL students – is not an "appropriate" step. The district court recognized as much by holding that Arizona had not taken "appropriate" action to comply with the EEOA at *Castaneda* step two by failing to "set a minimum base funding level per [ELL] student" that was rationally related to costs, regardless of the base level funding provided for all students. *Flores II*, 172 F.Supp.2d at 1239.

For eight years, Arizona has attempted to remedy *that* deficiency in ELL-specific funding, and for eight years the parties have litigated based upon that premise. Unlike in *Glover*, which repudiated the district court's excessive concern with specific compliance steps rather than with the core of its judgment, looking to the adequacy of ELL-specific funding does not miss the forest for the trees. It cuts to the heart of this case, which has been about such funding since 2000, when the parties dealt with the other issues in a consent decree. If the Superintendent and Legislative Intervenors believed that the district court erred and should have looked at all funding sources differently in its EEOA inquiry, they should have appealed the Declaratory Judgment. They may not now up-end its basic legal conclusions.

Nor have the fundamentals of the Arizona school funding system changed in any way that undermines

the district court's original conclusion that incremental ELL funding is what matters for EEOA purposes. Accepting the Superintendent and Legislative Intervenors' argument would be to hold that the funding restrictions and categories used by Arizona are meaningless. As we have explained, Arizona allocates ELL funding *on top* of base level support. HB 2010 and HB 2064 have followed this approach. This statutory scheme is still premised on the idea that ELL programming imposes costs *additional* to those covered by ordinary base level funding. Base level funds are still provided in block grants, as in 2000, and the grants are, as they were in 2000, unrestricted. And base level funding, although apparently not itself based on a clear cost accounting of educational needs, *see Roosevelt I,* 877 P.2d at 810, must still support most non-ELL educational costs. It is the base level funds that, if NUSD had no ELL students, would be spent on math, reading, writing, and other basic subjects. That funds for *both* basic educational support and ELL costs have increased does not indicate that the fundamental pattern has changed. In 2000, as today, ELL incremental costs *could* be covered by diverting basic educational support, hampering the state's ability to provide a basic education to all Arizona students. So, by underfunding ELL programs and forcing NUSD to dip into those base level funds, Arizona still forces it to choose between base level needs and ELL programs – which the district court refused to view as an answer to ELL funding in 2000, when the option was as available as

it is now. That binding legal determination is not now subject to reconsideration.[41]

Nor do circumstances in NUSD demonstrate that anything has happened to undermine the district court's conclusion in the original Declaratory Judgment that adequate levels of ELL-specific funding were critical to EEOA compliance. Ninety percent or more of NUSD students are either still in or have been in ELL programs. It is the *same* students who will suffer as the district shifts funding away from core educational needs to support ELL programs. When NUSD must choose to fund, say, required structured English immersion endorsements for its staff, rather than expanding its high school math or art offerings, all students will suffer, including ELL students, now as in 2000.

---

[41] Federal funds have also been taken out of the compliance calculus by the Declaratory Judgment. The district court understood EEOA compliance to be a state obligation and so ruled when, despite noting the presence of federal grants (which it doubted would be renewed), it held Arizona to be out of compliance with the EEOA for providing inadequate *state* funding and required *Arizona* to fund its ELL programs adequately. *Flores II,* 172 F.Supp.2d at 1236, 1239. That unappealed determination still stands. Although federal funds have since increased, we do not find that this increased funding availability undermines the district court's basic legal determination that the EEOA obligation rests in the first instance with Arizona. Indeed, as we discuss below, federal education funding law is generally designed to layer federal funds on top of state education funding and to ensure that state funds are allocated without regard to federal funds.

In short, the solution posited by the Superintendent and Legislative Intervenors – which the amici school districts and school boards in this case call a "Hobson's choice" – was rejected by the district court as a matter of law in the Declaratory Judgment when it based its holding on ELL-specific funding in general and the Group B weights in particular. Nothing significant has changed to undermine that ruling. Instead, the Superintendent and Legislative Intervenors are simply placing their suggested solution – spending less on basic education so as to have sufficient funds for ELL purposes – on the table after it was necessarily rejected in the unappealed judgment, which requires ELL-specific funding. That they may not do.

There was no clear error in the district court's factual findings and no abuse of discretion in its legal conclusion that the landscape was not so radically changed as to justify relief from judgment without compliance.

b. Changes in Law

The Superintendent and Legislative Intervenors also offer a legal change argument as to why the premises of the Declaratory Judgment have been so undermined as to justify relief from judgment despite noncompliance. They maintain that the passage of NCLB – and, in particular its Title III, which focuses on ELL students – has in some fashion altered their obligations by making the *Castaneda v. Pickard*

framework "obsolete," urging two points: First, that state compliance with NCLB benchmarks should be enough to satisfy the EEOA, and hence the judgment and, second, that NCLB obviates any need to do a state-wide cost study of ELL program incremental costs.

We are unpersuaded by the first, more important point. The Superintendent and Legislative Intervenors fail to appreciate the distinct purposes of the EEOA and NCLB: The first is an equality-based civil rights statute, while the second is a program for overall, gradual school improvement. Compliance with the latter may well not satisfy the former.[42]

Title III of NCLB sets out to "help ensure that children who are limited English proficient . . . attain English proficiency . . . and meet the same challenging State academic content and student achievement standards as all children are expected to meet." 20 U.S.C. § 6812(1). To aid in this goal, it provides grants to states with federal government-approved plans to benefit ELL students. *See* 20 U.S.C. §§ 6821-26. To retain grant eligibility, grantees must meet

---

[42] We also note that NCLB became law on January 8, 2002, *see* 115 Stat. 1425, prior to the district court's compliance rulings on IIB 2010, prior to the parties' previous appearance before this court in 2006, and more than five years prior to this appeal. It is now more than a little late to argue that NCLB effectively repeals the EEOA, and so justifies relief from the district court's judgment and orders. Any such change occurred well before the most recent orders were entered.

"annual measurable achievement objectives . . . includ[ing] . . . making adequate yearly progress for limited English proficient children." *See* 20 U.S.C. § 6842.

These objectives include "at a minimum, annual increases in the number or percentage of children making progress in learning English," "at a minimum, annual increases in the number or percentage of children attaining English proficiency by the end of each school year," and "making adequate yearly progress" in such children's academic achievement. 20 U.S.C. § 6842(a)(3)(A). Arizona defines these goals as "yearly growth in the fraction of students making progress towards English proficiency, those attaining English proficiency, and those students meeting/exceeding the AIMS objectives in order for Arizona to [meet the requirement that 100% of all students pass AIMS by] 2013-14." ARIZONA'S SCHOOL ACCOUNTABILITY SYSTEM TECHNICAL MANUAL: VOLUME III: TITLE III ACCOUNTABILITY at 5 (2005). Specifically, school districts are required to increase the fraction of students making progress toward English proficiency or being reclassified as English proficient by a specified percentage each year.[43] Additionally, increases in

---

[43] In academic year 2003-04, a 10% increase was required. This requirement increases by one percentage point each year until 2011.

reading and math proficiency are prescribed.[44] *Id.* at 5-11. Importantly, this very gradual improvement plan does not set as an objective immediate equalization of educational opportunities for each such student.

NCLB, in other words, packages federal grants with discrete, incremental achievement standards as part of a general plan gradually to improve overall performance. It does not deal in the immediate, rights-based framework inherent in civil rights law, although it is intended to ameliorate over the longer haul the conditions that lead to civil rights violations. Perhaps recognizing as much, Title III of NCLB explicitly provides that "[n]othing in this part shall be construed in a manner inconsistent with any Federal law guaranteeing a civil right." 20 U.S.C. § 6847.

The EEOA is just such a rights-enforcing law. It requires states "to ensure that needs of students with limited English language proficiency are addressed," *Idaho Migrant Council v. Bd. of Educ.*, 647 F.2d 69, 71 (9th Cir.1981), by requiring them to remove barriers to equal participation in educational programs now rather than later, and it provides students with a right of action to enable them to enforce their rights, *see* 20 U.S.C. § 1706; *Los Angeles NAACP v. Los Angeles Unified Sch. Dist.*, 714 F.2d 946, 950-51 (9th

---

[44] This increase must equal roughly 10% every three years until 2010, at which point it must increase 10% per annum until 2014.

Cir.1983). The EEOA's concerns, in other words, lie fundamentally with the current rights of individual students, while NCLB seeks gradually to improve their schools. An individual student whose needs are not being met under the EEOA need not wait for help just because, year after year, his school as a whole makes "adequate yearly progress" towards improving academic achievement overall, including for ELL students.

The position pressed by the Superintendent and the Legislative Intervenors – that state compliance with NCLB necessarily satisfies the EEOA[45] – cannot be squared with this understanding of the two statutes. In their view, NCLB now defines "appropriate action" under the EEOA, such that NCLB compliance is dispositive of EEOA compliance, regardless of whether incremental ELL funding is currently adequate to provide equal educational access to ELL students. But such an interpretation would, first, produce strange results: If a state happened to meet adequate yearly progress under NCLB one year, no suits could proceed under the EEOA, even if fundamental linguistic inequalities persisted in some or all of its schools, even if ELL financial resources were entirely inadequate, and even if the particular students bringing suit had not received adequate ELL assistance nor made any progress towards English

---

[45] We note that even if the state as a whole complies with NCLB, that does not mean that the individual district is in compliance.

language proficiency. Any meaningful ability to use the right of action under the EEOA would thus wink in and out of existence based upon the year-to-year vagaries of overall school test scores. The EEOA does not tolerate such ephemeral compliance. *See Castaneda,* 648 F.2d at 1010 (holding that a state violates the EEOA if even an adequately-funded program "fails, after being employed for a period of time sufficient to give the plan a legitimate trial"). The district court so held in the Declaratory Judgment. *Flores II,* 172 F.Supp.2d at 1238.

Our point, boiled down, is that the Superintendent's and Legislative Intervenors' view, if adopted, would effectively repeal the EEOA by replacing its equality-based framework with the gradual remedial framework of NCLB. Such a result is simply not consistent with the text of either the EEOA or NCLB. There is certainly no express repeal provision in NCLB. Quite to the contrary, NCLB contains a savings clause with regard to civil rights statutes.

Nor did NCLB repeal the EEOA by implication. "[R]epeals by implication are not favored. . . . In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton v. Mancari,* 417 U.S. 535, 549-50, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974); *see also Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* ___ U.S. ___, 127 S.Ct. 2518, 2532, 168 L.Ed.2d 467 (2007) (implied repeals are "not favored" and will only be inferred if "the later statute

expressly contradicts the original act or unless such a construction is absolutely necessary in order that the words of the later statute shall have meaning at all") (internal quotations and alterations omitted). Such is not the case here. The goals of the two statutes are complementary, as the saving provision of NCLB for civil rights statutes indicates.

We also cannot agree with the Superintendent and the Legislative Intervenors that this is a case where "a precisely drawn, detailed statute pre-empts more general remedies." *Brown v. Gen. Serv. Admin.*, 425 U.S. 820, 834, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976). Such cases concern instances where Congress has provided a narrower remedy for a class of harms otherwise covered by an older and more general statute. *See id.*(collecting cases). We have already discussed the quite different focuses of the two statutes. That Title III of NCLB operates in the same general substantive area as the EEOA is not enough for us to hold that the former was intended to replace the latter, particularly in light of explicit statutory language to the contrary.

Our analysis is further bolstered by the Supreme Court's similar analysis of a purported conflict between a civil rights statute and a general Spending Clause – based statutory grant program, like NCLB, in *Blessing v. Freestone,* 520 U.S. 329, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997). In that case, the Court considered whether the remedial scheme of Title IV-D of the Social Security Act displaced a right of action under 42 U.S.C. § 1983. *Id.* at 339-40. The Court held

that a statute like Title IV-D could displace § 1983 actions in only two ways: "[E]xpressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id.* at 341, 117 S.Ct. 1353.

There is, as we have noted, no express repeal here. And implied repeals of the remedial displacement kind are very rare, as the Court recognized in *Blessing*. *Id.* at 346-47, 117 S.Ct. 1353 (noting only two such instances with regard to § 1983); *see also Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n,* 453 U.S. 1, 20, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981) (detailing such an instance where the "quite comprehensive enforcement mechanisms" of two federal pollution statutes rendered it "hard to believe" that Congress intended to preserve § 1983 remedy for problems covered by the statutes).

Blessing also explicated an additional reason why NCLB cannot supercede the EEOA: The EEOA provides an express private cause of action, while NCLB does not. In *Blessing* the Spending Clause statute's "enforcement scheme" was limited because it had "no private remedy – either judicial or administrative – through which aggrieved persons can seek redress." 520 U.S. at 348, 117 S.Ct. 1353. The Court held that the substantive statute could not "close the door" on § 1983, because a "plaintiff's ability to invoke § 1983 cannot be defeated simply by the availability of administrative mechanisms to protect the plaintiff's interests." *Id.* at 347-48, 117 S.Ct. 1353 (internal

quotation and alteration omitted); *see also City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121, 125 S.Ct. 1453, 161 L.Ed.2d 316 (2005) ("[I]n *all* of the cases in which [the Court has held that a general program did not preempt a § 1983 cause of action] . . . the statute at issue . . . *did not* provide a private judicial remedy (or, in most of the cases, even a private administrative remedy) for the rights violated.") (emphases in original); *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 521, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990) (no repeal where the programmatic statute "contain[ed] no comparable provision [compared to statutes in *Sea Clammers* and similar cases] for private judicial or administrative enforcement"); *Smith v. Barton*, 914 F.2d 1330, 1334 (9th Cir.1990) ("[T]he doctrine of [*Sea Clammers*] only bars section 1983 claims that *could have been brought* under a separate federal statute which provides remedial devices sufficiently comprehensive to demonstrate a congressional intent to preclude section 1983 claims."); *cf. ASW v. Oregon*, 424 F.3d 970, 977 (9th Cir.2005) (holding that even some statutes *with* administrative mechanisms to protect plaintiffs' rights cannot preclude § 1983); *Price v. City of Stockton*, 390 F.3d 1105, 1115 (9th Cir.2004) (same).[46] Like

---

[46] The Superintendent also argues that the NCLB should be used to "assist in the interpretation" of the requirements of the EEOA. If he meant only that NCLB compliance is somewhat probative of EEOA compliance, we would agree. He argues, however, that NCLB's statutory scheme "supplemented and defined" the EEOA's "appropriate action" requirement such that

(Continued on following page)

the statute in *Blessing*, NCLB does not provide an explicit private enforcement scheme.[47] Applying the holding of *Blessing* and similar cases, the existence of an explicit private enforcement mechanism in one statute but not the other strengthens our conclusion that NCLB did not "close the door," *Blessing*, 520 U.S. at 348, 117 S.Ct. 1353, on suits such as this one.

The second argument in this vein made by the Superintendent and the Legislative Intervenors has more merit. That argument is that, after NCLB, an order to perform a statewide cost study of ELL program incremental costs, and fund accordingly, may not be entirely sensible. While such an order would not be an abuse of discretion, it is true that NCLB's monitoring protocols have encouraged the development of substantial district-by-district data. This data may make it easier, and more sensible, for a state like Arizona to tailor some amount of funding to the particular incremental costs associated with the

---

compliance with the former is also compliance with the latter. We have just explained why that proposition is not so, and casting it as an argument for modification rather than repeal makes no difference. *Defenders of Wildlife*, 127 S.Ct. at 2533 n. 8 ("It does not matter whether this alteration is characterized as an amendment or a partial repeal.").

[47] Because we find the complementary nature of the EEOA and NCLB clear, and because we do not wish to rule on a matter not squarely before us, we do not decide whether NCLB affords an implied right of action, although we note that some courts have concluded that it does not. *See Alliance for Children, Inc. v. City of Detroit Public Sch.*, 475 F.Supp.2d 655, 658 (E.D.Mich.2007) (collecting such cases).

ELL program in each district, rather than to provide a uniform ELL increment to all districts regardless of the distinct conditions in each district. It appears that the Arizona Constitution would permit some degree of such tailoring. *See Roosevelt I,* 877 P.2d at 814 ("[U]nits in 'general and uniform' state systems need not be exactly the same, identical, or equal."). That point, however, does not avail the Superintendent and Legislative Intervenors, as they did not move for such a limited modification of the judgment. Instead, they argued that the district court should simply grant complete relief from judgment.

In sum, just as no changes in fact have eliminated the premises of the Declaratory Judgment, no changes in law have done so either. The motion for relief from judgment, then, depends on showing that Arizona is, in fact, in compliance. And that question, in turn, depends on HB 2064.

2. HB 2064 and Actual Compliance

Perhaps recognizing the flaws in HB 2064, the Superintendent and Legislative Intervenors begin by arguing that the legality of the statute should not have been considered. That issue, they contend, was "outside" of our mandate on remand.

The contention makes no sense. HB 2064 was enacted as Arizona's effort to comply with the Declaratory Judgment and was so represented to the district court. That this characterization of HB 2604 is correct is indicated in the statute itself, which

provides that it will not go fully into effect unless the district court approves the statute as in compliance with its orders. It would be very strange if, on remand, our mandate to survey relevant changes of circumstances excluded such an obvious change.

Certainly, no portion of our mandate forbade such consideration. "[A]lthough lower courts are obliged to execute the terms of a mandate, they are free as to anything not foreclosed by the mandate." *United States v. Kellington,* 217 F.3d 1084, 1092 (9th Cir.2000) (quotation omitted). We remanded for the district court to hold an evidentiary hearing and explicitly decided no other issue. The district court held such a hearing.[48] There is no further mandate issue in this case.[49]

---

[48] The Superintendent also argues that the district court generally disobeyed the mandate by not making adequate findings of fact and conclusions of law. We disagree. Although the Superintendent might wish that the district court had made different findings and conclusions, the district court nonetheless fulfilled its task sufficiently to satisfy the mandate.

[49] Nor are there problems of ripeness or of forum. True, as the Superintendent and Legislative Intervenors note, it is highly unusual for questions of state compliance with federal school funding law to come before a court in the first instance. The Department of Education has an extensive administrative hearing apparatus, 20 U.S.C. §§ 1234 *et seq.*, and such cases would ordinarily originate there. Here, however, HB 2064 was *presented* to the district court as a ground for relief from judgment, and on its face became fully effective only if approved by the district court. As part of its inquiry, the court necessarily had to determine whether, on its face, HB 2064 satisfied the requirements of federal law; if not, the problems it was designed to

(Continued on following page)

Proceeding to the merits of the HB 2064 issue, we hold that the district court's conclusions of law regarding the statute were not abuses of its discretion.[50] The court held that HB 2064's two-year funding cut-off was irrational, rendering it inadequate to comply with the judgment and that, in addition, several facial violations of federal law further compounded the statute's problems. *Flores XI,* 480 F.Supp.2d at 1166. We agree.[51]

---

solve would only be exacerbated. Thus, there are no forum problems here and, as HB 2064 became effective immediately, save for the Group B weights, there is no ripeness issue.

For similar reasons, the Legislative Intervenors' contention that the district court should have certified the question of HB 2064's interpretation to the Arizona Supreme Court is not well taken. They do not propound any substantial question of interpretation that would justify certification, instead only asserting generally that the statute might be "unclear." Yet, under Arizona law, a certification order must set forth "[t]he questions of law to be answered." ARIZ.REV.STAT. § 12-1863. Moreover, the argument was raised for the first time in their reply brief and such arguments are "generally deemed waived." *United States v. Anderson,* 472 F.3d 662, 668 (9th Cir.2006).

[50] Because the Superintendent and Legislative Intervenors argue that the district court should not have considered the legality of HB 2064 at all on remand, they do not directly argue that HB 2064 satisfies the judgment and so come close to waiving that argument entirely. But because they *do* argue in the alternative that the district court's decisions on HB 2064 were substantively wrong, they have preserved the issue, and we will consider it.

[51] Whether the district court could have declared Arizona to be in compliance immediately upon the passage of HB 2604 even if the law was facially appropriate is not entirely clear, although

(Continued on following page)

First, and most clearly, HB 2064's two-year funding cut-off alone renders the law inadequate as a funding scheme rationally grounded in the costs of providing ELL programs, as the district court held. *Flores XI,* 480 F.Supp.2d at 1166. There is absolutely no evidence in the record to support the proposition that a student's need for ELL programs invariably vanishes after two years of instruction: Instead the evidence is squarely to the contrary, as all witnesses testified that some students would certainly take longer than two years to become proficient in English. Yet funding for both the Group B weights and the Arizona structured English immersion fund is unavailable after two years. *See* ARIZ.REV.STAT. §§ 15-756.01(J), HB 2064 § 6. All that remains thereafter is

---

we do not decide the matter. Under the *Castaneda* framework adopted by the district court:

> If a school's program, although premised on a legitimate educational theory and implemented through the use of adequate techniques, fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome, that program may, at that point, no longer constitute appropriate action as far as that school is concerned.

Castaneda, 648 F.2d at 1010. HB 2064 itself suggested that the court might allow the statute to be implemented "on an interim basis . . . to determine whether the resulting ELL plans and available funding to implement the plans bear a rational relationship to the cost of implementing appropriate language acquisition programs." HB 2064 § 15(A).

compensatory instruction funding, *see* ARIZ.REV.STAT. § 15-756.11, which cannot be used to support "normal classroom instruction." ARIZ.REV.STAT. § 15-756.11(G). To cut funding to children who have not yet learned English after two years of instruction, providing only for compensatory instruction – which cannot occur during class-time and so leaves the incremental costs of assistance for such children during the regular school day unfunded – cannot comply with the judgment. The district court did not abuse its discretion by holding HB 2064 inadequate in this regard.

Second, as we have discussed above, the district court did not clearly err in holding that HB 2064's Group B weight increase alone was not sufficient to meet the incremental costs of ELL programming. *Flores XI,* 480 F.Supp.2d at 1162. The two grant programs created by HB 2064 might, however, be able to make up the gap between the incremental costs and the Group B weights, as the district court found, *id.*, and so these secondary programs become important to our analysis. It is, first, important to note that these grant programs will be of no significance at all unless they are funded and, as we have noted, the statute does not require that any appropriations be made for either program in coming years, although it does provide an initial appropriation for the compensatory instruction fund. But even if the programs are funded, they do not well serve Arizona's effort at compliance.

Specifically, the district court held that HB 2064 cannot comply with the judgment because its grant

programs violate several provisions of federal education funding law. *Id.* at 1166. Penalties for such violations include limitations on further grants and, in some cases, requirements that states pay back some or all of the grants they have already received. *See* 20 U.S.C. §§ 1234 *et seq.* If such violations are present, HB 2064 cannot be adequate relief. Its implementation would imperil federal funds for both non-ELL and ELL students.

The clearest violation of federal law discussed by the district court is the state's violation of 20 U.S.C. § 7902, which, covering all of the pertinent federal grant programs, provides that "[a] State shall not take into consideration payments under this chapter (other than under subchapter VIII) in determining the eligibility of any local educational agency in that State for State aid, or the amount of State aid, with respect to free public education of children." The Declaratory Judgment in this case is directed at the funds distributed by the state to local educational agencies, so § 7902 is applicable. And HB 2064 manifestly requires that federal funds be considered with regard to distribution of funds from both the structured English immersion fund, *see* ARIZ.REV.STAT. §§ 15-756.01(I)(1)-(3), and the compensatory instruction fund, *see* ARIZ.REV.STAT. § 15-756.11(E).[52] HB 2064 therefore violates 20 U.S.C. § 7902 on its face.

---

[52] The district court so held only with regard to the Arizona structured English immersion fund. Compensatory instruction

(Continued on following page)

The Legislative Intervenors offer only one counter-argument on this point, which we do not find persuasive: They suggest that "free public education," as used in 20 U.S.C. § 7902, is defined in relation to state law and that, under Arizona law, the term does not apply to ELL programs. So, they contend, 20 U.S.C. § 7902 does not apply to HB 2064's programs.

The federal definition of "free public education" is "education that is provided – (A) at public expense, under public supervision and direction, and without tuition charge; and (B) as elementary school or secondary school education as determined under applicable State law, except that the term does not include any

---

fund monies, however, may not be allocated to "supplant any federal . . . monies . . . budgeted for [E]nglish language learners as of February 23, 2006." ARIZ.REV.STAT. § 15-756.11(E). That provision is therefore also in violation of federal law.

Our conclusion is unaffected by 20 U.S.C. § 6321(d), which provides an exception to some federal fiscal requirements for a narrow class of state funds expended for programs benefitting disadvantaged children. Arizona receives funding from several other federal programs. We need not decide if § 6321(d) could ever affect the application of § 7902, because § 15-756.11(E)'s consideration of federal funds is not limited to funds covered by § 6321(d). So, even if the exception were relevant here, it would not excuse Arizona from complying with federal fiscal requirements which it does not cover and § 15-756.11(E) would thus still violate § 7902. In any event, it is far from clear, although we need not decide the matter, that the compensatory instruction funds would be covered by the exception in the first place. *See* 20 U.S.C. § 6321(d) (limiting the exception to "supplemental State . . . funds expended . . . for programs that meet the intent and purposes of this part"); *see also* 34 C.F.R. § 200.79 (defining the boundaries of the "intent and purposes" exception).

education provided beyond grade 12." 20 U.S.C. § 7801(21). The provision relies only on state law to define "elementary or secondary school education," *not* "free public education," and thus defers to states with regard to which *grades* are embraced by the definition – not with regard to subject areas or services. That the "as determined under applicable State law" provision applies only to subsection (B) of the definition is indicated by the absence of a comma after "secondary school education;" by the existence of an "except" clause after the "as determined" phrase that pertains directly to subsection (B); and by the absurd results that would flow from the Superintendent and Legislative Intervenors' reading: Under their interpretation, states could define entire subjects or programs out of the federal funding statute's reach by changing their state definitions of "free public education."

In any event, we find nothing in Arizona law to suggest that ELL programming is, in any sense, not part of a "free public education" in Arizona. The very existence of HB 2010 and HB 2064, and of the Group B weighting program, indicates otherwise.

In sum, the district court did not abuse its discretion in concluding that HB 2064 does not constitute compliance.[53]

---

[53] The district court also held that HB 2064 facially violates the "supplement not supplant" provisions of many federal education funding statutes. *Flores XI*, 480 F.Supp.2d at 1166.

(Continued on following page)

We therefore affirm the district court's holding that HB 2064 does not warrant relief from judgment.[54] Indeed, to the extent that improved conditions in NUSD might somewhat support relief from judgment,

---

These provisions ensure that federal funds are truly additional to state funds by providing that federal efforts are to add to state programs, rather than simply replacing state funds with federal money without actually increasing existing efforts. *See Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 659, 105 S.Ct. 1544, 84 L.Ed.2d 590 (1985) (discussing Title I "supplement not supplant" provision); *Dep't of Educ., State of Hawaii v. Bell*, 770 F.2d 1409, 1413 (9th Cir.1985) (same).

Because the two-year funding cut-off and the violation of 20 U.S.C. § 7902 each alone render HB 2064 insufficient to justify relief from judgment, we need not decide whether the district court correctly decided the "supplement not supplant" question, or whether, as the moving parties argue, it did so prematurely because the local educational entities have not yet spent any money. As we have explained, it is quite uncommon to confront whether a state funding statute complies with federal educational funding law in the first instance. *See* 20 U.S.C. §§ 1234 *et seq.*; *see also Bell v. New Jersey*, 461 U.S. 773, 791-92, 103 S.Ct. 2187, 76 L.Ed.2d 312 (1983) (discussing the Department of Education's auditing process and holding that the "existence and amount of liability [under such provisions] are committed to the agency, in the first instance"). Doing so here was made necessary by the unusual circumstance that HB 2064's compliance with the Declaratory Judgment turns in part on such questions. But we need not decide more than is required. The somewhat more complicated issues raised by the "supplement not supplant" provisions are not necessary to our inquiry, so we do not decide them.

[54] Flores and Arizona argue that HB 2064 also violates federal law by requiring offsets of federal impact aid monies, *see generally* 20 U.S.C. §§ 7701 *et seq.*, and of school district desegregation monies. Because the district court addressed neither question, we do not reach these issues.

HB 2064's flaws largely negate their import: The stark two-year cut-off it creates on all of Arizona's ELL funding (save for compensatory instruction funds which are no substitute for funding for day-to-day instruction) combined with the very real possibility that the funding scheme may trigger federal enforcement action, may well retard or reverse whatever progress has been made. So, to the extent that circumstances have changed after HB 2064, due to these two flaws they changed in large measure for the worse.

We note, however, that the district court has recently spoken again to this issue in its current contempt order, *Flores XII,* No. CV-92-596 (D.Ariz. Oct. 10, 2007), indicating that, despite HB 2064's flaws, Arizona may be nearing compliance. In that order, the court again noted the problems with HB 2064 that we have discussed but emphasized that, in its view, they could be cured by abandoning the two-year cut-off and by declining to consider federal funds in the grant-making process. *Id.* at 3-4. The model-based funding structure of the statute itself, the court held, was not at variance with the Declaratory Judgment, and the incremental costs data that districts are required to submit would, save for the flaws we have noted, enable Arizona "to rationally fund the new models for the ELL programs." *Id.* at 4.[55] There is

[55] We do not, of course, express any view on the merits of the district court's contempt order, as it is not before us in this appeal.

reason, then, to hope, if the models are in fact funded and the two changes noted by the district court in its most recent order are made, that this dispute, which has been in the courts longer than it takes a student to go from kindergarten to college, may finally be nearing resolution.

III. CONCLUSION

Arizona did not appeal the original judgment and has not complied with the Declaratory Judgment or with the bulk of the post-judgment relief orders. For all the reasons we have given, it is not inequitable to continue to require compliance. We therefore affirm the district court.

AFFIRMED.

480 F.Supp.2d 1157

United States District Court, D. Arizona.
Miriam FLORES, individually and as parent of Miriam Flores, a minor child, et al., Plaintiffs,
v.
State of ARIZONA, et al., Defendants.
No. CIV 92-596-TUC-RCC.

March 22, 2007.

Eric J. Bistrow, Burch & Cracchiolo PA, David B. Rosenbaum, Osborn Maledon PA, Lynne Christensen Adams, Jose A. Cardenas, Kimberly Anne Demarchi, David D. Garner, Lewis & Roca LLP, Susan P. Segal, Office of the Attorney General, Phoenix, AZ, John C. Richardson, DeConcini McDonald Yetwin & Lacy PC, Tucson, AZ, for Defendants.

ORDER

COLLINS, District Judge.

On March 3, 2006, the Speaker of the Arizona House of Representatives and the President of the Arizona Senate requested Leave to Report to the Court the Adoption of House Bill 2064 ("HB 2064") (Docket No. 373) and Defendant State of Arizona filed a Motion to Expedite Consideration of State's Motion for Accelerated Consideration of Legislation (Docket Nos. 374-375). On March 8, 2006, the Court held a telephonic status hearing and requested the parties to brief the Court on HB 2064 to determine if HB 2064 satisfied both the December 2005 Court Order and the January 2000 Judgment in this matter.

On April 3, 2006, a hearing was held and the Court took the case under advisement. The Court considered the following memorandum and supporting documents: Defendant Thomas Home's Memorandum in Support of the Act (Docket No. 414); Defendant State of Arizona's Opening Brief (Docket No. 415); Plaintiff Miriam Flores' Brief Regarding Sufficiency of House Bill 2064 (Docket No. 419); Amicus Arizona School Boards Association's Brief *Amicus Curiae* Brief (Docket No. 425); Amicus House and Senate Democratic Caucuses of the Arizona Legislature's Brief (Docket No. 427); Plaintiff Miriam Flores' Brief (Docket No. 428); and Intervenor Parties Speaker of the House/President of the Senate's Brief Replying to Opening Briefs of Plaintiffs and Attorney General (Docket Nos. 422 and 434). As a result, this Court held that HB 2064 did not satisfy the January 2000 Order and Judgment ("January 2000 Order") or the December 2005 Order and denied the Intervenor's Motion to Purge Contempt, Dissolve Injunctions, Declare Orders Satisfied, and Set Aside Injunctions.

On April 25, 2006, the Court entered an order holding that HB 2064 did not bear a rational relationship to the cost of providing ELL Programs, as required by this Court's January 2000 Order. The Court's April 2006 Order (Docket No. 448) was based on the following identified problems with the new law:

1. The Act does not comply with the Court's original Judgments and Orders.

2. On its face, the Act does not appropriately fund the ELL program.

3. The Act fails to delineate the cost of providing a viable ELL program.

4. The Act does not explain the basis for the $77 increase for Group B weight students or how the $432 appropriation is rationally related to the ELL program.

5. The $432 appropriation is more than current funding, however it is less than the amount that was discredited in a "cost study" that was done more than eighteen years ago, and less than the amount that was determined by the now "discredited cost study" held two years ago.

6. Based on the Act, there is no way to determine if the models are indeed standards for school districts and charter schools to follow.

7. The two-year limitation is a violation of federal law. And,

8. The offsets of federal funds such as Title I, IIA, III, Impact aid and desegregation monies also violate federal law.

On July 31, 2006, the Ninth Circuit Court of Appeals reversed this Court's Orders holding the Moving Defendant's in contempt and rejecting House Bill 2064 ("H.B.2064") and remanded to the District Court

with instructions to hold an evidentiary hearing and make findings of fact regarding whether "changed circumstances" required modification of the original court order pursuant to Rule 60(b)(5). The Court held an eight day evidentiary hearing, beginning on January 9, 2007. The parties presented live testimony and stipulated to admit into evidence most exhibits. The trial addressed only one specific issue. The following issue was tried: whether funding and programmatic changes that have occurred since the January 2000 Order in this case warrant a modification of that judgment or otherwise bear on the appropriate remedy in this case. The Court has considered all the testimony and exhibits, the briefs filed before and after the hearing as well as the findings of fact and conclusions of law by all parties.

This Court's Order will be as brief as possible as the Court promised the parties a speedy ruling so that the State Legislators could take action before its scheduled adjournment if needed. It is the contention of the Superintendent and the Legislative Intervenors that the Court's January 2000 Order has been satisfied. Specifically, the moving Defendants state that "changed circumstances" in the Nogales Unified School District ("NUSD") has satisfied the original January 2000 Order and obligates the Court to at least modify or vacate that original order. The moving Defendants put forth what they contend to be the "stellar" successes of NUSD and supposedly great strides taken by the State to comply with the Court's Order.

There is no doubt that NUSD is doing substantially better that it was in 2000. The State's superintendent of schools is doing better than it was in 2000 with regards to its role in making sure that children receive quality education. The Arizona Department of Education ("A.D.E.") is doing much more than it was in 2000, with regard to creating standards, norms and oversight for Arizona's public schools and students with regard to ELL programs. It is apparent that the A.D.E. has taken its role seriously and is endeavoring to establish appropriate standards and goals for all students in Arizona. It should be noted that it would be premature to make an assessment of some of these changes. Indeed, many of the new standards are still evolving. Unfortunately, the moving State Defendants and Legislative Interveners are not doing better as it pertains to satisfying the original Court Order.

The strides made by NUSD have been made largely as a result of their efforts alone. The State Superintendent and State Legislators sing the praises of Mr. Kelt Cooper – he was called Super Cooper due to his efforts in the NUSD – and his noted achievements during his tenure as Superintendent for NUSD however, he is but one person and is no longer employed by NUSD. The success or failure of the children of NUSD or any other School district should not depend on having a "Super Cooper" at the helm. The State must establish clear rules and requirements that can be fulfilled and followed, no matter who is in charge.

Several claims were made suggesting that NUSD is doing well, however NUSD's success is fleeting at best, particularly as it pertains to NUSD's high school students. It is great that children in elementary and middle school are doing better however, that is not sufficient. Success must also include the high school students of NUSD. Currently, this is not being accomplished.

All parties agree that learning English doesn't take place in a vacuum. Also, all parties agree that it takes a number of resources and often more than two years to achieve success in any ELL program. Plaintiffs argue that the impetus for success in NUSD was greatly attributed to the raising of their ELL program costs, which were $1,570.00 more than the base level funding normally provided by the State. The moving Defendants argue that the successes at NUSD qualify as "changed circumstances" and ask the Court to lift its sanctions. However, NUSD's changed circumstances had little or nothing to do with any help from the moving Defendants themselves.

By increasing the standards of accountability, the Federal No Child Left Behind Act ("NCLB") has to some extent significantly changed State educators approach to educating students in Arizona. In order to receive funding, NCLB requires certain adequate yearly progress to be made by each public and charter school. NCLB also requires States to create and accountability system of assessments so that public schools can continually receive funding. NCLB also

reaffirms the requirement of the State to effectively educate non-English speaking students.

Just as the State has to consider all school districts when coming up with funds for a single district like NUSD, it is impossible to limit the effects of the judgment and the Court's Order to NUSD. While the Court has heard testimony regarding the cost of programs other than the programs at NUSD, the Court findings are based upon the evidence of what exists in NUSD except where specifically stated otherwise.

The parties are aware that this Court analyzed HB 2064 last spring and does so again here for the purpose of determining whether or not the Court's January 2000 Order has been satisfied. It should be noted that the Court finds the same problems today that it saw last year, because HB 2064 is the same, the problems themselves are the same. The parties are to refer back to the April 2006 Order (Docket No. 448) for the Court's reasoning.

The Court having heard the testimony and having examined the evidence offered by the parties, and having heard the arguments of counsel and being fully advised herein, the Court now finds generally in favor of Plaintiffs and against Defendants, and hereby makes the following special Findings of Fact and Conclusions of Law pursuant to Federal Rules of Procedure, Rule 52(a) and (c) as well as Rule 60(b)(5) which constitutes the decision of the Court herein:

FINDINGS OF FACT

To the extent these Findings of Fact are also deemed to be conclusions of law, they are hereby incorporated into the Conclusions of Law that follow.

1. At the time of this Court's judgment in January 2000, the State funded ELL instruction by adding a per-student amount (the "Group B weight") for every ELL student in a school district or charter school to the amount of per-student funding provided for English proficient students.

2. Since 2000, the State has changed its primary model of ELL instruction from bilingual education to structured English immersion.

3. The State has also increased generally available funding for schools programs, facilities, and teachers. It has also used federal grant money to provide for additional, short-term assistance with reading instruction to some at-risk schools, including four in the Nogales Unified School District ("NUSD").

4. ELL students need extra help and that costs extra money. (Tr. 1/8/07 at 101.) The process for funding ELL instruction in the State now and for the foreseeable future, absent some further legislative enactment, is controlled by HB 2064; which attempts to meet the requirement of the EEOA by calculating and funding the "incremental costs" of ELL instruction, which are statutorily defined as "costs that are associated with a

Structured English Immersion program pursuant to section 15-752 or a program pursuant to section 15-753 and that are in addition to the normal costs of conducting programs for English proficient students." A.R.S. § 15-756.01(L)(2).

5. HB 2064 adds an additional sum to the Group B weight, which, if it were currently effective would raise funding per ELL student from approximately $365 to approximately $444. (Tr. 1/17/07 at 67-68.) This additional sum will not be provided unless and until this Court issues an order approving HB 2064 as a response to this Court's January 2000 judgment, which it has not done. (HB 2064 § 14.)

6. Beginning in the 2007-08 school year, HB 2064 institutes a system of cost-based funding using instructional models to be developed by a task force. A.R.S. § 15-756.01(C).

7. Under the new law, school districts and charter schools will choose from among the approved instructional models, A.R.S. § 15-756.02, and calculate the incremental cost of implementing that model in their district or school, A.R.S. § 15-756.01(H).

8. Depending on the amount of the incremental cost of the chosen instructional model, a school district or charter school may be able to request additional funds to cover that cost from the Structured English Immersion ("SEI") Fund. A.R.S. § 15-756.01(I).

9. The amount of the allowable SEI Fund request is limited. (*Id.*) Before requesting funds, districts and schools must deduct from the calculated incremental cost (1) the Group B weight, (2) all federal Title III monies they receive, (3) a proportionate share of the federal Title I and II A monies they receive, (4) a proportionate share of the federal impact aid monies they receive, and (5) a proportionate share of their desegregation funds. (*Id.*) Only if they still have unmet incremental costs after applying all of those funding sources may they request monies from the SEI Fund, and only in that limited amount.

10. The Plaintiffs presented evidence that the per-student incremental cost of providing ELL instruction is greater than either the current Group B weight of $365 or the increased weight of $444 that would be provided if this Court approved HB 2064, both in NUSD and in other districts. (Exs. 7, 9, 10, 14; Tr. 1/18/07 at 59-60; Tr. 1/24/07 at 117, 131; Tr. 1/25/07 at 15-16; Tr. 1/25/07 at 148, 156.) Therefore, the SEI Fund provisions of A.R.S. § 15-756.01(I) will govern the total amount of funding received by NUSD and other districts and schools to educate their ELL students.

11. Federal funds available under the Title I, IIA, and III programs are designed to provide additional educational resources for at-risk students, not to subsidize any obligation the state may have to educate those students. (Tr. 1/9/07 at 12.) Grants of federal

funds therefore carry a restriction on "supplanting," or the substitution of federal funds for the funds a state would otherwise have spent on a program in the absence of the federal funds.

12. The amount of federal funds Arizona received or expects to receive under the No Child Left Behind Act totals $575,714,495 and $582,931,537 for fiscal years 2006 and 2007, respectively. (Tr. 1/9/07 at 173 & Ex. 305.) The largest portions of these funds are for Title I programs in the amounts of approximately $289,000,000 and $295,000,000 for fiscal years 2006 and 2007, respectively. (*Id.*) The supplement not supplant restriction goes to the core purpose of Title I, which is to make certain that children in high poverty schools [receive] extra services. (Tr. 1/9/07 at 166.)

13. The State agrees, in writing, to comply with this restriction on supplanting as a condition of receiving federal funds. (Ex. 300.) It also agrees to ensure that any school districts to which it provides subgrants will also refrain from supplanting. (*Id.*) To that end, the State requires districts receiving federal funds to sign an agreement that they will not use federal funds to supplant state educational funds. (*See, e.g.*, Tr. 1/25/07 at 72-73.)

14. A state found to have used federal funds to supplant state educational expenditures faces the prospect of being required to return

the misused funds and may lose future eligibility for federal funds under those programs for all students. (Tr. 1/9/07 at 174-75, 183.) In Arizona, the potential loss of federal funds is substantial, as the State receives approximately $600 million per year. (*Id.* at 183.)

15. Thomas Fagan, a 29-year veteran of the United States Department of Education and an expert on Title I funding testified, referring to HB 2064, that he had "never seen such a blatant violation" of supplement not supplant restrictions. (Tr. 1/9/07 at 162-64 & 186.)

16. HB 2064 also imposes a time limit on funding available to school districts and charter schools for the education of their ELL students. After a student has been classified as an ELL for more than two years, funding for English language instruction provided to that student is cut off. A.R.S. § 15-756.04(C). The district or school will continue to receive base level funding for the student, just as it receives for English proficient students, but it will not receive either the ELL Group B weight or any [additional monetary support] from the SEI fund to meet the incremental cost of providing structured English immersion instruction to that student. *Id.*

17. The district or school may still receive compensatory instruction funds for students who do not reach English proficiency within

two years, but those funds are not guaranteed or formula-based, and the statute permits compensatory instruction funds to be used only for services apart from normal classroom instruction. A.R.S. § 15-756.04(C), § 15-756.11(G). (*See also* Tr. 1/11/07 at 132.) Under HB 2010, the predecessor to HB 2064, compensatory instruction funds could be used to improve academic proficiency and English language proficiency. (Tr. 1/10/07 at 130-31.) HB 2064 limits the use of compensatory instruction funds to improving English language proficiency. (*Id.*)

18. Because of the two-year cutoff, districts and schools will have to bear the incremental costs of normal classroom instruction for ELL students who take longer than two years to attain English proficiency. Alternatively, they will have to dilute their remaining Group B weight funds to cover these students as well. In NUSD that would effectively reduce the district's Group B weight funds from $365 to $182. (Tr. 1/17/07 at 68.)

19. HB 2064 also limits the availability of C.I.F. for reclassified English proficient students to only the first two years after they are reclassified. A.R.S. § 15-756.11(G). The use of compensatory instruction funds is limited to improving English language proficiency even though reclassified students are, by definition, proficient in English. (Tr. 1/11/07 at 134-35.)

20. No distributions have been made from the $10,000,000 compensatory instruction fund created by HB 2064. On a per ELL student basis, the fund provides $74 per student. (Tr. 1/17/07 at 69-70.)

21. Many students may attain English language proficiency within two years, but two years of ELL instruction is insufficient for many English Language Learners.

22. On average, it takes ELL students in the NUSD four to five years to be reclassified as English proficient. (Tr. 1/18/07 at 17-18; *see also id.* at 40.) Tucson Unified School District ELLs spend an average of 4.6 years in ELL programs. (Tr. 1/24/97 at 204.) In the Murphy Elementary School District, 86% of exited students took more than two years to achieve English language proficiency. (Tr. 1/25/07 at 163-64, 168-70, 172-73; Ex. 16.) Proficiency within two years is the exception in the Scottsdale Unified School District. (C. Rivera Depo. at 67.) And in the Glendale Union High School District, 46% of the ELL students in Glendale High School and 15% of those at Sunnyslope High School take more than two years to achieve English language proficiency. (Docket Entry 614, Plaintiffs Notice of Filing Exhibit)

23. The Defendant-Intervenors and the Defendant Superintendent of Public Instruction (collectively, the Moving Parties) did not present any evidence that two years is a sufficient amount of time for all ELL

students to attain English language proficiency.

24. The State does not currently have data as to the statewide average for how long students are classified as ELLs before they exit the system. (Tr. 1/11/07 at 112.)

25. Those of the Moving Parties' witnesses who addressed the subject were unanimous in their opinion that at least some students will not reach English language proficiency in two years.

26. The Moving Parties' expert, Rosalie Porter, testified that achieving English language proficiency takes approximately two years, but "some children will certainly require more time." (Tr. 1/8/07 at 110 & 128.) She also testified that services and funding for those children should not be cut off. (*Id.* at 127.)

27. Irene Moreno, who is in charge of the English Acquisition Services section of the Arizona Department of Education testified that people "that have been in the system" believe students become proficient in English "generally anywhere from two to three years." (Tr. 1/10/07 3 at 11.) She also testified that the one model for ELL instruction developed by her group "allows for the possibility that students are going to take longer than two years." (*Id.* at 103.)

28. The former superintendent of NUSD, Kelt Cooper, testified that he "would think

that within three years a bright young person with a great deal of support could probably be pretty good at a second language, but I'm comfortable with three years being fairly strong." (Tr. 1/11/07 at 85.) He was not comfortable with a one or two year time period. (*Id.* at 107.)

CONCLUSIONS OF LAW

1. To the extent any of these Conclusions of Law contain findings of fact, they are hereby incorporated into the Findings of Fact above.

2. The [Federal] Equal Educational Opportunities Act ("EEOA") requires the State "to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. § 1703(f).

3. In order to satisfy the mandate of the EEOA, the State may choose any legitimate established or experimental instructional method; the Court will not interfere with the State's choice from among legitimate available models of language instruction. *See Castaneda v. Pickard*, 648 F.2d 989, 1009 (5th Cir.1981).

4. Once the State has chosen an instructional method, it must provide sufficient funding to implement that method. *Id.*

5. It is in this regard that this Court found the State's actions deficient under the EEOA in its January 2000 judgment. The Court

found that the State had not adequately funded ELL programs in the Nogales Unified School District, as demonstrated by inadequate resources available to educate ELL students in that district, and that the State had failed to fund ELL programs in a manner rationally related to the cost of providing the State's chosen instructional model.

6. While this Court's January 2000 findings of fact and conclusions of law identified certain specific areas in which the NUSD ELL educational program was lacking, such as classroom size and materials, mere amelioration of those specific conditions is inadequate to comply with this Court's judgment and subsequent orders. Rather, compliance would require a funding system that rationally relates funding available to the actual costs of all elements of ELL instruction.

7. The Intervenor Defendants, joined on remand in this argument by the Superintendent, contend that there has been a sufficient change in the underlying factual circumstances that justifies setting aside this Court's 2000 judgment as satisfied and ending judicial supervision over this case.

8. The movants' burden is defined by the procedural rule under which they seek relief – Federal Rule of Civil Procedure 60(b)(5). That rule provides that relief from a judgment may be had if "the judgment has been satisfied, released, or discharged, reversed or

otherwise vacated, or it is no longer equitable that the judgment should have prospective application."

9. Rule 60(b)(5) provides relief from final judgments where a "significant change in facts or law warrants revision of the decree." *Bellevue Manor Assocs. v. U.S.,* 165 F.3d 1249, 1255 (9th Cir.1999) (quoting *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992)). There must be a showing that "it is no longer equitable that the judgment should have prospective application, not when it is no longer convenient to live with [its] terms." *Rufo,* 502 U.S. at 383, 112 S.Ct. 748; *see also Agostini v. Felton,* 521 U.S. 203, 257, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (Ginsburg, J. dissenting) ("[R]eligitation of the legal or factual claims underlying the original judgment is not permitted in a Rule 60(b) motion or an appeal therefrom.").

10. To prevail on a Rule 60(b)(5) motion, the movant must "satisfy the initial burden of showing a significant change either in factual conditions or in the law warranting modification of the decree." *U.S. v. Asarco, Inc.,* 430 F.3d 972, 979 (9th Cir.2005) (citing *Rufo,* 502 U.S. at 384, 112 S.Ct. 748). If the movant meets that burden, it must show that its proposed modification of the decree is "suitably tailored to resolve the problems created by the changed factual or legal conditions." *Id.* (citing *Rufo* at 391, 112 S.Ct. 748.)

11. A movant who cites significantly changed factual conditions "must additionally show that the changed conditions make compliance with the consent decree 'more onerous,' 'unworkable,' or 'detrimental to the public interest.'" *Id.* (citing *Small v. Hunt*, 98 F.3d 789, 795 (4th Cir.1996) and *Rufo* at 384, 112 S.Ct. 748).

12. The movants in this case have attempted to demonstrate that the judgment has been satisfied, relying both on (1) evidence about new methods and funding sources in place now that did not exist in the State in 2000 and (2) HB 2064 as a funding method that satisfies the legal requirement that funding be rationally related to the actual cost of ELL programs. In such cases, the Court must evaluate whether changes in the defendants' activities are "so significant as to warrant an end of court supervision." *See Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir.2000). While an extended period of voluntary compliance is "a factor supporting termination of an injunction . . . more is required." *S.E.C. v. Coldicutt*, 258 F.3d 939, 943 (9th Cir.2001).

13. HB 2064, which currently controls ELL instructional funding violates federal law.

14. HB 2064 takes into consideration federal funds received under the Elementary and Secondary Education Act ("ESEA"), in violation of 20 U.S.C. § 7902. A.R.S. § 15-756.01 determines the amount of funding

available to districts and schools to fund the incremental costs of educating ELL students in a calculation that depends on the amount of ESEA funds that district or school has received. This is absolutely forbidden under federal law and this Court therefore cannot approve HB 2064's funding system.

15. Because HB 2064 attempts to meet the State's obligation to fund ELL instruction with federal funds that cannot be so used, it does not comply with the EEOA. HB 2064 does not provide for full State funding of ELL instructional costs. Rather, it subtracts a proportionate share of the federal funds received by a district or school from the amount that that district or school will receive. A.R.S. § 15-756.01(I).

16. The federal laws governing use of the Title I, IIA, and III funds at issue expressly forbid the State from using those funds to "supplant," or replace, funds that the State would otherwise provide. 20 U.S.C. § 6314(a)(2)(B) (Title I funds for schoolwide programs); § 6315(b)(3) (Title I funds for targeted programs); § 6613(f) (Title IIA grants to states); § 6623(b) (Title IIA subgrants to local educational authorities); § 6825(g) (Title III funds). HB 2064 violates these supplement not supplant restrictions. Therefore, a district or school whose incremental costs exceed the Group B weight provided to all schools will face the choice of violating federal laws governing the use of their federal funds, thereby jeopardizing both those funds

and eligibility for future federal funds, or underfunding its ELL instructional programs. Neither scenario represents compliance with the EEOA.

17. These violations of federal law jeopardize the entire stream of federal educational funds available to the State's students, a sum of almost $600 million per year. Withdrawal of eligibility for those funds, or an order that the State repay them in whole or part, would have serious detrimental consequences for all Arizona students, including ELL students.

18. HB 2064 imposes an impermissible two-year limitation on funding for ELL instruction, cutting off all funding for the incremental cost of ELL classroom instruction, including the Group B weight. The EEOA does not permit time limits or restrict the State's obligation to ELL students to two years. The evidence showed that some ELL students need more than two years to become proficient in English. As a result, HB 2064 fails to fund each year of ELL instruction necessary to attain proficiency.

19. For all these reasons, the funding mechanism put in place by HB 2064 fails to comply with the EEOA. HB 2064 fails to satisfy this Court's judgment because it does not provide funding for ELL instruction, for all ELL students, that is rationally related to the cost of that instruction. Instead, it systematically underfunds ELL instruction by

impermissibly considering and deducting federal funding amounts that cannot be used for those purposes and by imposing a two-year limitation on the funding available for any student.

20. Rule 60(b)(5) relief is only available under limited circumstances where the moving party can establish (1) a significant change in the facts or the law warrants revision of the decree, (2) changes in the defendants' activities are so significant as to warrant an end of court supervision, (3) changed conditions make compliance with the consent decree more onerous, unworkable, or detrimental to the public interest, and (4) the moving party's proposed modification of the court's decree is suitably tailored to resolve the problems created by the changed factual or legal conditions. The Moving Parties failed to satisfy any of these prerequisites to Rule 60(b)(5) relief.

CONCLUSION

On January 24, 2000, this Court held that the State's minimum funding level for ELL programs was arbitrary and capricious and bore no rational relation to the actual funding needed to insure that ELL students could achieve mastery of the State's academic standards. *See Flores v. State of Arizona,* 172 F.Supp.2d 1225 (D.Ariz.2000). More than 7 years later, circumstances in this regard remain the same. The Moving Parties have not shown compliance with

this Court's decree, much less changed circumstances that would warrant modification or dissolution of this Court's order. Accordingly,

IT IS HEREBY ORDERED that the Court finds in Favor of the Plaintiffs.

FURTHER, IT IS ORDERED that the Court finds that the moving Defendants failed to satisfy the requirements pursuant to Rule 60(b)(5) for relief.

FURTHER, IT IS ORDERED that the State has until the end of the current Legislative Session to comply with the Original Order.

---

204 Fed.Appx. 580

United States Court of Appeals, Ninth Circuit.

Miriam FLORES, Plaintiff-Appellee,

v.

Rosa RZESLAWSKI, individually, and as a parent of Mario Rzeslawski, a minor child, Plaintiff-Appellee,

Thomas C. Horne, Superintendent of Public Instruction, State of Arizona, Defendant-Appellant, and State of Arizona; C. Diane Bishop; Eugene Hughes; David Silva; Claudine Bates Arthur; John Hosner; Ken Bennett; Ray Kellis; Jim Allman; Morrison Warren, members of the State Board of Education, Defendants, American Council of Engineering Companies of Arizona; Associated General Contractors of America, Arizona Chapter, Defendant-Intervenors.

Evangelina Miranda, individually and as a parent of Mariela and George Dorame, minor children, Plaintiff-Appellee,

v.

Thomas C. Horne, in his official capacity as Superintendent of Public Instruction, State of Arizona; The Arizona Board of Education, and its individual members in their official capacities, Defendants, American Council of Engineering Companies of Arizona; Associated General Contractors of America, Arizona Chapter, Defendant-Intervenors, and State of Arizona, Defendant-Appellee, The Speaker of the Arizona House of Representatives and President of the Arizona Senate, Defendant-intervenor-Appellant.

Evangelina Miranda, individually and as a parent of Mariela and George Dorame, minor children, Plaintiff-Appellee,

v.

Thomas C. Horne, in his official capacity as Superintendent of Public Instruction, State of Arizona, Defendant-Appellant, State of Arizona, Defendant-Appellee, and The Arizona Board of Education, and its individual members in their official capacities, Defendant,

American Council of Engineering Companies of Arizona; Associated General Contractors of America, Arizona Chapter; The Speaker of the Arizona House of Representatives and President of the Arizona Senate, Defendant-Intervenors.

Miriam Flores; Rosa Rzeslawski, individually, and as a parent of Mario Rzeslawski, a minor child, Plaintiffs-Appellees,

v.

State of Arizona, Defendant-Appellee, The Speaker of the Arizona House of Representatives and President of the Arizona Senate, Defendant-intervenor-Appellant, and Thomas C. Horne, Superintendent of Public Instruction, State of Arizona; C. Diane Bishop; Eugene Hughes; David Silva; Claudine Bates Arthur; John Hosner; Ken Bennett; Ray Kellis; Jim Allman; Morrison Warren, members of the State Board of Education, Defendants,

American Council of Engineering Companies of Arizona; Associated General Contractors of America, Arizona Chapter, Defendant-Intervenors.

Miriam Flores; Rosa Rzeslawski, individually,

and as a parent of Mario Rzeslawski,
a minor child, Plaintiffs-Appellees,
v.
State of Arizona, Defendant-Appellee,
Thomas C. Horne, Superintendent of Public
Instruction, State of Arizona, Defendant-Appellant,
and C. Diane Bishop; Eugene Hughes; David Silva;
Claudine Bates Arthur; John Hosner; Ken Bennett;
Ray Kellis; Jim Allman; Morrison Warren, members
of the State Board of Education, Defendants,
American Council of Engineering Companies
of Arizona; Associated General Contractors of
America, Arizona Chapter; The Speaker of the
Arizona House of Representatives and President
of the Arizona Senate, Defendant-Intervenors.
Nos. 06-15378, 06-15556, 06-15558,
06-15951, 06-15952.

Argued and Submitted July 25, 2006.
Filed Aug. 23, 2006.

William Eric Morris, Arizona Justice Institute, Tucson, AZ, Timothy M. Hogan, Esq., Phoenix, AZ, for Plaintiff-Appellee.

Jose Cardenas, Esq., Lewis & Roca, LLP, Phoenix, AZ, Eric J. Bistrow, Esq., Burch & Cracchiolo PA, Phoenix, AZ, for Defendant-Appellant.

Jeanne Galvin, Office of the Arizona Attorney General, Lynne C. Adams, Esq., Lewis & Roca, LLP, Phoenix, AZ, for Defendants.

James J. Sienicki, Esq., Snell & Wilmer, LLP, Keith F. Overholt, Esq., Jennings Strouss & Salmon, PLC, Phoenix, AZ, for Defendant-Intervenors.

Appeal from the United States District Court for the District of Arizona, Raner C. Collins, District Judge, Presiding. D.C. No. CV-92-00596-RCC.

Before: HUG, KLEINFELD, and PAEZ, Circuit Judges.

MEMORANDUM*

This case deals with the consolidated appeals of several district court orders. The first several orders found the State of Arizona in civil contempt of the district court's previous order to reform the State's English Language Learner (ELL) program, enjoined administration of the AIMS test to ELL students as a requirement for graduation until the program had been reformed, and provided for the distribution of the fines collected to school districts to fund ELL programs. The second order rejected House Bill 2064, determining it failed to comply with the court's original order.

In the interim, the landscape of educational funding has changed significantly. We have held that, because "the scope of federal relief against an agency of state government must always be narrowly tailored to enforce federal constitutional and statutory law only. . . . federal courts must be sensitive to the need

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

for modification [of permanent injunctive relief] when circumstances change."[1] In light of the changes in education programs and funding since the original 2000 court order, the district court should have held an evidentiary hearing and made findings of fact regarding whether changed circumstances required modification of the original court order or otherwise had a bearing on the appropriate remedy. The orders of the court holding the defendants in contempt and rejecting House Bill 2064 are therefore vacated and the case is remanded to the district court. Because we hold that the district court should have held an evidentiary hearing on changed circumstances, we need not, and do not, reach any of the other issues in the case.

VACATED AND REMANDED.

---

[1] *Clark v. Coye*, 60 F.3d 600, 604 (9th Cir.1995).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MIRIAM FLORES, individually and as parent of Miriam Flores, a minor child, et al.,	No. CV 92-596-TUC-RCC
Plaintiffs,	**ORDER**
vs.	(Filed Apr. 26, 2006)
STATE OF ARIZONA, et al.,	

On March 3, 2006, the Speaker of the Arizona House of Representatives and the President of the Arizona Senate requested Leave to Report to the Court the Adoption of Bill 2064 (Docket No. 373) and Defendant State of Arizona filed a Motion to Expedite Consideration of State's Motion for Accelerated Consideration of Legislation (Docket Nos. 374-375). On March 8, 2006, the Court held a telephonic status hearing and requested the parties to brief the Court on H.B. 2064 ("Act") to determine if the Act satisfied both the December 2005 Court Order and the January 2000 Judgment in this matter.

On April 3, 2006, a hearing was held and the Court took the case under advisement. The Court has considered the following memorandum and supporting documents: Defendant Thomas Horne's Memorandum in Support of the Act (Docket No. 414); Defendant State of Arizona's Opening Brief (Docket No. 415); Plaintiff Miriam Flores' Brief Regarding

Sufficiency of House Bill 2064 (Docket No. 419); Amicus Arizona School Boards Association's Brief *Amicus Curiae* Brief (Docket No. 425); Amicus House and Senate Democratic Caucuses of the Arizona Legislature's Brief (Docket No. 427); Plaintiff Miriam Flores' Brief (Docket No. 428); and Intervenor Parties Speaker of the House/President of the Senate's Brief Replying to Opening Briefs of Plaintiffs and Attorney General (Docket Nos. 422 and 434).

As set forth below, the Act does not satisfy the January 2000 Judgment or the December 2005 Order. As such Intervenor's Motion to Purge Contempt, Dissolve Injunctions, Declare Orders Satisfied, and Set Aside Injunctions (Docket No. 422) is DENIED.

DISCUSSION

In January 2000, after eight years of protracted litigation, the Court held that the State's minimum base level for funding the Lau programs – now being called English Language Learner Program ("ELL") – was arbitrary and capricious and bears no relation to the funding needed to ensure children are achieving the State's specified minimum standards. *See Flores v. Arizona,* 172 F.Supp.2d 1225, 1239 (D.Ariz.,2000).[1]

---

[1] A 1987-1988 cost study determined that it would take $450 per LEP student to appropriately fund the program. The State Defendants questioned the study and determined it to be unreliable yet, it was never updated. Based on that cost study the State appropriated $150.00 per limited English proficient ("LEP") student. The most recent study, again discredited by the

(Continued on following page)

In January 2005, the Court ordered that the Defendants had until the end of the legislative session to comply with the January 2000 Judgment by appropriately funding the State's ELL programs. In December 2005, the Court held the Defendants had yet to comply with either the January 2000 Judgment or January 2005 Order and found the Defendants in civil contempt.

The Court acknowledges that the landscape with regard to ELL programing has changed since the original Court Order of 2000. The method of delivery has been changed by the voters and implemented by the State of Arizona to that of a language immersion program. There has been some progress made in the Nogales Unified School District ("NUSD") with regard to improved academic success for some elementary and junior high school students.

Since the original Court Order, the federal law, 20 U.S.C.A § 1703, the Equal Education Opportunity Act ("EEOA"), has not changed. It is still a requirement that the State under the Elementary and Secondary Education Act ("ESEA") provide funding for ELL students that is not arbitrary and capricious. The State under § 9522 of ESEA must assure the federal government that it uses these funds according to federal law. It is still the law that a State may not consider the use of federal funds to determine eligibility

---

legislature, put the cost of funding the ELL program substantially higher.

of a district or charter school for State funding. Finally, the No Child Left Behind ("NCLB") program did not supercede the State's duty to properly fund the ELL program. The Act does not satisfy the Court Order of 2000, nor does it comply with federal law in several respects.

HOUSE BILL 2064

The Arizona Legislature adopted the Act and it became law on March 9, 2006. The Speaker of the Arizona House of Representatives ("Speaker") and President of the Arizona Senate ("President") contend that the Act satisfies applicable federal law and the judgment and orders of this Court when considered by itself or alternatively, when considered in combination with the massive reforms of Arizona K-12 education since 2000. The Court disagrees. The Act does not bare any rational relationship to the cost of providing an ELL program, as originally indicated by Judge Marquez, and it has added new hurdles to the mix.

Amount of Funding

The Act provides almost the same amount of funding for ELL programs as was provided during the last legislative session. The Act increases Group B weight of $355 per ELL student to $432 per ELL student. Although this amounts to a $77 increase, it is $18 dollars short of the "unreliable" cost study done nearly eighteen years ago, which estimated a $450

per student cost. In fact, the Act does not explain how this $77 increase in the Group B weight was derived. The State has not shown that this increase has any rational relationship to any ELL program.

The cost of implementing the ELL program has not been established by the Act. The Court cannot determine if the $77 increase bears any rational relationship to the actual cost of the ELL program or that it adequately funds the ELL program in a non-arbitrary and capricious manner. It was required under Judge Marquez' Order that the State was to establish minimum standards for providing funding and program oversight. The Act does not do it.

It was contended by attorneys for Intervenors for the Arizona House and Senate and the Superintendent that a Task Force was to be established by the Legislature to set the minimum standards and requirements for the ELL program to be followed by Arizona district schools and charter schools. The Act states that the Task Force shall develop and adopt research based models of structured English immersion programs for use by school districts and charter schools. The Act is silent on whether these models are "standards" to be used by the school districts and charter schools. If these models are indeed standards, then this would be a step towards an appropriate remedy. The final step must include a per student cost assessment for implementing these models, and a rationally related funding level appropriated by the State legislature.

Federal Funds

The Act creates a task force that authorizes districts and charter schools to request State funding to cover the incremental costs of ELL programs, however, it subtracts certain federal funds from the amounts schools are allowed to request. The Act requires districts and charter schools to use Title I, Title II, and Title III monies to offset its funding for ELL programs. Federal funds are to supplement, not supplant State funds for education. States that receive Title I, Title II, and Title III monies of the No Child Left Behind Act ("NCLB") are not to use those funds to supplant State funds allocated for those programs. 20 U.S.C.A. § 6314 provides that:

> A school participating in a school wide program shall use funds available to carry out this section only to supplement the amount of funds that would, in
>
> 1. the absence of funds under this part, be made available from non-Federal sources for the school, including funds needed to provide services that are required by law for children with disabilities and children with limited English proficiency.

20 U.S.C.A. § 6314(B). 20 U.S.C.A § 6613 provides that:

> Funds received under this subpart shall be used to supplement, and not supplant, non-Federal funds that would otherwise be used for activities authorized under this subpart.

20 U.S.C.A. § 6613(f). 20 U.S.C.A. § 6825 provides that:

> Federal funds made available under this subpart shall be used so as to supplement the level of Federal, State, and local public funds that, in the absence of such availability, would have been expended for programs for limited English proficient children and immigrant children and youth and in no case to supplant such Federal, State, and local public funds.

20 U.S.C.A § 6825(g). It is clear that the Act requires schools to used federal funding to finance a State obligation. Federal funds according to federal law can only be used to supplement that obligation.

The State has an obligation to ensure it uses federal funds according to federal law. The Act does not state with any specificity how federal monies will not supplant State funds for the ELL program. The Act reminds district schools and charter schools they must adhere to all State and federal laws, but requires them, by using offsets, to violate federal law. The offsets established by the Act, violate federal law by supplanting federal dollars for State public funds for education. The Act forces district schools and charter schools to under-fund their ELL programs or other programs by the use of these offsets. These provisions of the Act clearly violate the rule against supplanting state public funds.

The Act also requires schools to offset their ELL program requests by using Impact Aid monies. A.R.S. § 15-756.01(I) states in pertinent part that the State "... shall only apply unused impact aid monies to ELL programs after it has applied its impact monies for other allowable uses...." A.R.S. § 15-756.01(I)(3).[2] However 20 U.S.C. § 7709 prohibits States from taking impact aid payments into account for un-certified uses as determined by the U.S. Secretary of Education. 20 U.S.C. § 7709(c)(3). This provision of the Act violates federal law.

The Superintendent contends that the Act does not misuse federal funds, however, the offsets violate federal law by forcing district schools to misuse previously allocated federal funds. The Act requires school districts to offset from their ELL budget requests "a portion of desegregation monies levied pursuant to A.R.S. § 15-910." A.R.S. § 15-756.01(I)(4). Section 15-910 allows a school district under a Court Order of desegregation or the U.S. Department of Education's Office of Civil Rights ("OCR") Agreement to obtain funds to be used solely for "remedying alleged or proven racial discrimination." A.R.S. § 15-910(G). District schools cannot transfer or offset funds as the Act requires because it would hamper their duty to comply with Court-ordered desegregation mandates and requirements in their OCR agreements.

---

[2] A.R.S. 15-756.01 became effective on March 9, 2006.

The *Amicus* Arizona School Boards Association, Tucson Unified School District ("TUSD") and Tempe Elementary School District ("TESD"), explain how in their view they will receive inadequate ELL funding from the State under the Act. Outside of Group B weighted monies, the Act will completely eliminate the State's obligation to provide funding for TUSD and TESD for ELL programing. The Act would require TUSD to subtract 13% of its desegregation monies, or $8,060,000, from the State's ELL program obligation because 13% of TUSD students are classified as ELL. This single offset equates to more than $1,100 per district ELL student. The Act would require TESD to subtract 22% of its desegregation monies, or $2,860,000, from the State's ELL program obligation. This offset amounts to $900 per district ELL student. The Act would require both TUSD and TESD to make Title I, IIA, III and Impact aid offsets as well. Requiring districts such as TUSD, TESD, and other similarly situated districts to offset desegregation monies and other federal funds in this manner, violates federal law. The Act jeopardizes their continued receipt of those funds and ability to fulfill their court-ordered obligations and agreements.

The Act does not offer any guidance to those schools in how to use this provision without violating federal law, Court Orders, or consent decrees. By reducing the State's ELL funding obligation by a specified percentage of a district school's desegregation money, the Act contradicts federal mandates and

Court orders that control the use of those monies. The Act in this respect also violates federal law.

Two-Year Limitation

Pursuant to A.R.S. § 15-756.04(C) the Act imposes a two-year limit on funding to each school for the education of each ELL student. Under this section, a student will be cut from the Group weight B category if he or she does not become proficient in English within two years. The district will continue to receive base level funding for the student, but it will not receive either the ELL support level weight or any extra money from the Structured English Immersion ("SEI") fund.

The Act creates a compensatory instruction fund. Under the Act, instruction outside of the school year and school day shall be provided with "compensatory" instruction funds, pursuant to A.R.S. 15-756.11. This includes individual or small group instruction, extended day classes, summer school, or intersession school. A.R.S. 15-756.11(G) limits the compensatory fund to ELL students who have been reclassified as English proficient within the two previous years. Pursuant to the Act, outside of the school day or year, students who were not reclassified as English proficient can not participate in any of the programs created to improve their English skills. A student would need to be reclassified as English proficient before any district or charter school could apply for these funds. This provision will only hinder the

progress of both district schools and charter schools, who are working hard to help ELL students become English proficient.

The purpose of the ELL program is to enable a student to meet the minimum standards set by the State of Arizona, not to punish both the student and the school despite their best efforts. The two-year requirement might be a goal for district and charter schools to obtain, but it should not be a cut-off provision for ELL program funding. The EEOA requires the State to take appropriate action to overcome language barriers that impede equal educational participation by students. 20 U.S.C. § 1703(f). The EEOA does not impose a time limitation and the State's funding obligation is a continuing one until students have overcome language barriers that impede their participation. The two-year limitation under the Act without an exception is contrary to the EEOA, poses a significant burden on both the schools and the students and denies students access to funding regardless of their academic standing.

CONCLUSION

The Act does not comply with the Court's Judgments and Orders. On its face, the Act does not appropriately fund the ELL program. The Act fails to delineate the cost of providing a viable ELL program. The Act does not explain the basis for the $77 increase for Group B weight students or how the $432 appropriation is rationally related to the ELL program. The

$432 appropriation is more than current funding, however it is less than the amount that was discredited in a "cost study" that was done more than eighteen years ago, and less than the amount that was determined by the now "discredited" cost study held two years ago. Based on the Act, there is no way to determine if the models are indeed standards for school districts and charter schools to follow. The two-year limitation is a violation of federal law. The offsets of federal funds such as Title I, IIA, III, Impact aid and desegregation monies also violate federal law.

The Act fails to satisfy Judge Marquez' January 2000 Court Order. It also does not comply with Federal Law. Therefore, the Court finds that the Act does not satisfy both the January 2000 and January 2005 Court Orders. The parties are referred back to the Court's December 2005 Order.

DATED this 25th day of April, 2006.

/s/ Ramer Collins
Ramer C. Collins
United States District Judge

405 F.Supp.2d 1112

United States District Court, D. Arizona.
Miriam FLORES, individually and as parent of Miriam Flores, a minor child, et al., Plaintiffs,
v.
State of ARIZONA, et al., Defendants.
No. CV92-596TUC-RCC.

Dec. 15, 2005.

Eric J. Bistrow, Burch & Cracchiolo PA, Jeanne Marie Galvin, Lynne Christensen Adams, Lewis & Roca LLP, Mariannina E. Preston, Peter D. Kushibab, Roger William Hall, Renaud Cook-Drury Mesaros PA, Terri M. Skladany, Elliott Talenfeld, Susan P. Segal, Office of the Attorney General, Jose A Cardenas, David D. Garner, Lewis & Roca LLP, Timothy Michael Hogan, Arizona Ctr. for Law in the Public Interest, Phoenix, AZ, William Eric Morris, Arizona Justice Institute, Tucson, AZ, for Defendant.

ORDER "WO"

COLLINS, District Judge.

On October 31, 2005, the Court took under advisement a request made by Plaintiffs for sanctions due to the State of Arizona's failure to take action to comply with the Court Order (Docket No. 296), that found that English Language Learners ("ELL") programs must be funded in a manner that is not arbitrary and capricious. Also, the Court took under advisement the following motions: Defendant's Opposition to Motion for Sanctions and Request for Accelerated Determination

Re: Consideration of Federal Funds (Docket No. 303), and the Opposition of ACEC and AGC to Plaintiffs' Motion for Sanctions (Docket No. 300).

The Court was also asked to preclude the State from requiring ELL students to pass the Arizona's Instrument to Measure Standards ("AIMS") test as a necessary criteria to receive a diploma and graduate from high school until the State has properly funded ELL programs for a sufficient period of time to provide ELL students with a meaningful opportunity to achieve the State's academic standards that are measured by the AIMS test.

Defendants have asked the Court for an advisory opinion to decide the status of federal funds in relation to the determination regarding the adequacy of ELL funding. Plaintiffs have asked the Court for attorney's fees for their continued efforts in trying to get the State to comply with its legal obligations to fund ELL programs properly.

The Court has reviewed this case from its inception which was 1992. Thousands of children who have now been impacted by the State's continued inadequate funding of ELL programs had yet to begin school when Plaintiffs filed this case. After extensive lawyering on both sides, the case finally resulted in Judge Marquez deciding in February 2000, that the method used by the State for funding ELL programs bore no rational relationship to the actual cost of providing such programs and was inadequately funded in an arbitrary and capricious manner that

was violative of the Equal Education Opportunity Act ("EEOA") of 1974.

The legislature in the first instance decided after some prodding by both the Plaintiff and the Court, that they would do a cost study for determining the amounts necessary to achieve this purpose. In December of 2001, the legislature passed House Bill ("HB") 2010. This bill was to be an interim measure that would allow for the study to be completed and for the legislature to have time to pass the necessary legislation to comply with the Court's order. Ultimately, with the Court's consent, the legislature gave itself nearly three years to accomplish this process. In January 2005, Plaintiffs approached the Court to complain that the study had yet to be completed and that they believed more than enough time had passed for the legislature to complete its obligation.

On January 28, 2005, the Court gave the State until the close of the 2005 legislative session to comply with the Court's Order and essentially to fulfill its promise to set the appropriate funding for ELL programs. When the Court issued that Order, it had already been asked by the Plaintiffs to apply sanctions for the State's failure to live up to its obligation. It was with that backdrop that the Court gave the legislature and the State one last chance to comply with Judge Marquez' Order of February 2000.

Defendants allege that they take their obligation to establish adequate funding for ELL programs very seriously. Defendants assert that due to good faith

differences between the States' executive and legislative branches as it pertains to the needs of the ELL students, they were unable to enact the legislation contemplated by the January 28, 2005, Court order. Defendants argues that their non-compliance does not equate to "indifference" as asserted by the Plaintiffs' Motion for sanctions.

The legislature passed HB 2718 at the end of the 2005 session, and the Governor vetoed it because she believed it was inadequate to comply with the Court's Order. Not much activity has transpired since. The legislature believes that it has complied with the Court's Order. The Governor disagrees. Whether or not the legislative or executive branch is right or wrong and whether or not either has acted in good faith is of no moment because nearly six years have passed since the Court issued the original Order requiring the State to establish adequate funding for ELL programs.

The Court can only imagine how many students have started school since Judge Marquez entered the Order in February 2000, declaring these programs were inadequately funded in an arbitrary and capricious manner that violates ELL students' rights under the EEOA. How many students may have stopped school, by dropping out or failing because of foot-dragging by the State and its failure to comply with the original Order and compliance directives such as the Order issued on January 28, 2005? Plaintiffs are no longer inclined to depend on the good faith of the Defendants or to have faith that without some

extraordinary pressure, the State will ever comply with the mandates of the respective Orders issued by this Court.

Plaintiffs contend that after nearly six years, it is clear that using Court Ordered deadlines is not an effective means for enforcing the State's compliance with the EEOA of 1974 and this Court's declaratory judgment. Plaintiffs assert that the establishment of yet another deadline by this Court will not guarantee relief. As such, Plaintiffs argue, that this Court must consider more meaningful sanctions as a coercive measure to ensure the State's full and swift compliance and provide ELL students with the rights to which they are entitled under the law.

I. Motion for Injunctive Relief

Plaintiffs assert that in 1991, the State Board of Education adopted academic standards that prescribed the content knowledge in subjects including reading, writing and mathematics that students should master at every grade level. Plaintiffs also assert that after the adoption of the academic standards, legislation was enacted that required the State Board of Education to adopt a competency test as a prerequisite to graduation from high school. A.R.S. § 15-701.01(A)(3). The AIMS test is designed to measure student achievement of the State Board adopted academic standards in reading, writing and mathematics. A.R.S. § 15-741.

Plaintiffs contend, regardless of their performance, requiring ELL students to pass the AIMS test to graduate while being denied the equal participation guaranteed to them under federal law, is patently unfair. Plaintiffs assert that this case was filed to protect the rights of ELL students under the EEOA to equal participation in instructional programs. 20 U.S.C. § 1703(f). As such, Plaintiffs argue that the relief this Motion seeks is necessary to ensure that ELL students are not harmed any further by the State's intransigence as it pertains to the Court's order and the law.

Plaintiffs assert that regardless of AIMS test scores, ELL students have been attending schools with ELL programs that this Court declared are illegally underfunded. Additionally, Plaintiffs argue, it is unfair to those students that they be required to pass a graduation test that is premised on a system in which all students have the same opportunity to achieve the State's academic standards. Plaintiffs further argue that the relief requested in this motion would be necessary even if ELL students as a group, were performing as well as, or better than, their peers on the AIMS test.

Plaintiffs state that the ELL failure rate is more than three times the failure rate of English proficient students. Plaintiffs contend that 82% of ELL students continue to fail the AIMS test in reading and 81% ELL students continue to fail in writing. As such, Plaintiffs argue without adequately funded programs, ELL students cannot be expected to succeed to the

same extent as their peers until the language barriers that impede their equal participation are removed as required by the EEOA.

Plaintiffs argue that this Court should exercise its broad equitable powers to protect ELL students from permanent and irreparable harm due to the State's continuing failure to comply with the Court's judgment and the EEOA. Plaintiffs argue that if past discrimination is sufficient for the exercise of the Court's equitable powers, then the current discrimination that is visited on ELL students by the State should be more than sufficient to invoke the Court's equitable powers to protect ELL students. *See Spallone v. United States,* 493 U.S. 265, 276, 110 S.Ct. 625, 107 L.Ed.2d 644 (1990).

Here, Plaintiffs argue that courts have enjoined the administration of high stakes graduation tests when their application would be unfair or perpetuate past discrimination. *Debra P. v. Turlington,* 644 F.2d 397 (5th Cir.1981). In, *Debra P.,* the Court enjoined the administration of the graduation test on both due process and equal protection grounds.[1] Plaintiffs argue that the application of *Debra P.,* in this case is clear. Plaintiffs contend that just as it was unfair to punish black students for deficiencies created by the

---

[1] In *Debra P.,* the Court determined that, in part, the failures of black students taking the test could be attributed to the unequal education they received during the period when Florida maintained a dual school system based on race.

dual school system in *Debra P.*, it would be equally unfair to punish ELL students for the deficiencies caused by Arizona's continuing failure to adequately fund ELL programs. As such, Plaintiffs request that the Court enjoin the State from requiring ELL students to pass the AIMS test in order to graduate from high school. Additionally, Plaintiffs request that the AIMS test not be used to preclude ELL students from graduating until ELL programs have been adequately funded for a sufficient period of time so that ELL students will have a meaningful opportunity to achieve the academic standards that are assessed by the AIMS test.

Defendants assert that the AIMS issue raised by the Plaintiffs was rejected by the Court in 1999. Defendants further argue that Plaintiffs did not appeal that decision and cannot now circumvent that ruling by claiming they are entitled to the same result as a way of enforcing compliance with the Court's EEOA ruling. Defendants also contend that Plaintiffs failed to meet their burden of proof as it pertains to the AIMS test.

Defendants contend that the Court prefaced its January 2000 Order by noting that the August 1999 trial "addressed only two specific issues . . . 1) whether or not Defendants' [sic] adequately fund and oversee the LAU program in NUSD, and 2) whether or not the AIMS test disparately impacts minority students at NUSD." *Flores v. Arizona*, 172 F.Supp.2d

1225, 1226 (D.Ariz.2000).[2] Finally, Defendants argue that although Arizona is approaching the first year in which passing the AIMS test will be a requirement for graduation from high school for all students, this is a fact that Plaintiffs knew six years ago.[3]

Here, Defendants contend that Plaintiffs are reduced to arguing that they are entitled to relief because ELL students attend schools that this Court declared are illegally underfunded. Defendants argue that this logic is incorrect for two reasons. First, it would effectively allow Plaintiffs to use their victory on their EEOA claim as a basis for getting relief on the AIMS clam that they lost. Second, passing the AIMS test is not the only graduation requirement for Arizona students including ELL students. There are a number of graduation requirements, for example, a minimum number of credits that students must successfully complete. Defendants contend that under Plaintiffs' arguments, if the AIMS testing requirement is not imposed on ELL students this year, it

---

[2] The Court then stated, "Plaintiffs' Second Amended Complaint did not include the AIMS Challenge; nevertheless, the Court heard the parties' arguments and finds that Plaintiffs failed to present evidence at trial to make a prima facie case of disparate impact." *See also Lau v. Nichols,* 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974).

[3] "The State Board has also determined that in order to receive high school diplomas, all students in the Arizona public school system, except those with certain disabilities, must earn satisfactory AAS/Essential Skills scores on the AIMS tests, effective in 2000-2001." *Flores v. Arizona,* 48 F. Supp 2d 937, 956 (D.Ariz.1999).

should not have been imposed at any time over the past 5 years.

Defendants argue that granting relief requested by Plaintiffs might actually create rather than eliminate impermissible disparate treatment and thus possibly raise equal protection issues. Defendants contend the non-application of the AIMS test would raise significant equal protection issues because ELL students would be exempt from passing the AIMS test, however, the AIMS test graduation requirement would stand for all non-ELL students.

Defendants contend that Plaintiffs not only failed to present a prima facie claim, but they failed to even explain how requiring ELL students to pass the AIMS test to graduate violates due process and equal protection rights. Defendants argue that in *Debra P.*, the Court initially concluded that due process concerns were implicated because the testing requirement was imposed at "the eleventh hour."[4] Unlike *Debra P.*, Defendants argue, Arizona students have had nearly ten years notice that passing the AIMS test would become a graduation requirement. Defendants further state that the underlying district court decision in *Debra P.* found four to six years sufficient.[5] Defendants

---

[4] *Debra P.*, 644 F.2d 397 (5th Cir.1981).

[5] *Debra P.*, 730 F.2d at 1407 (citing *Debra P. v. Turlington*, 474 F.Supp. at 244, 267) (M.D.Fla.1979); *cf. Williams v. Austin Indep. Sch. Dist.*, 796 F.Supp. 251, 253-54 (W.D.Tex.1992) (upholding exit exam requirement and distinguishing *Turlington* because "In this case, students in Texas have known for seven

(Continued on following page)

contend that *Debra P.* did find an equal protection violation that was based on the trial court's finding that black students' poor performance on the exit exams was related to Florida's relatively recent operation of a school system segregated on the basis of race. However, Defendants argue, no such claim has been made here.

Defendants argue that Plaintiffs failed to mention that, upon remand, the district court lifted its injunction against the use of high stakes testing. *Debra P. v. Turlington*, 564 F.Supp. 177, 189 (M.D.Fla.1983), *aff'd* 730 F.2d 1405 (11th Cir.1984). Defendants state the court did so because of its decision that the Florida test was "constitutionally impermissible only if the disproportionate failure rate among black students is due to the learning deficits created by the past segregation of the Florida public schools or its effects." *Id.* at 188.

Defendants argue students have known for years that passage of the AIMS test would eventually be required for graduation; students have five separate opportunities to pass the test; and the State has made available tutoring funds for remedial efforts designed to help students, including ELL students, who may need additional assistance. Additionally, Defendants argue, under recently enacted legislation, students graduating in 2006 or 2007 will be able to

---

years that they must pass a comprehensive examination before receiving their diplomas.").

apply grades received in some high school classes to augment their AIMS test scores. A.R.S. § 15-701.01.

Defendants state that the Tenth Amendment requires that the Court should give due deference to the State's decision to require students to pass the AIMS test. Defendants argue that in the absence of proof of discrimination, courts are rightly reluctant to interfere with the great latitude given the States in the area of education. Defendants state that even the cases Plaintiffs cite acknowledge this principle. Also, Defendants argue that the *Williams* court acknowledged this principle in its analysis.[6] Defendants submit that Plaintiffs have failed to prove the extraordinary circumstances that would warrant the extraordinary interference they seek. As such, Defendants argue that Plaintiffs' motion seeks a remedy for a claim that they not only have not proved, but that has been rejected. Defendants' request that Plaintiffs' motion be denied.

As an alternative, Plaintiffs assert, Defendant's lack of concern for Arizona's ELL students and lack of respect for this Court's orders, the Court should

---

[6] "The level of education and academic achievement necessary to obtain a diploma . . . is appropriately a judgment call for the person elected for that state responsibility and those experienced persons responsible for educating and preparing students to achieve the established level of competence. Any interference in this process is simply destructive to the attempts by the state to salvage its educational system, and this includes interference by the federal judiciary." 796 F.Supp. at 256.

enjoin the receipt of federal highway funds. Plaintiffs also ask the Court to delay the proposed sanctions for at least 30 days from the issuance of the Court's order so that the Defendants have an opportunity to enact the remedial legislation that is required.

The Court views their request for injunctive relief as different and distinct from determining that the AIMS test is biased or has a disparate effect. This is about requiring something of ELL students for which the State has failed to provide the proper foundation and for which the State still wishes to require ELL students to nevertheless hold up the walls.

Plaintiffs submission that more than 80% of ELL students in high school have failed the AIMS graduation test is adequate for injunctive relief in light of the egregious delay in complying with the Court's Orders. Until Defendants make the appropriations required for properly funding ELL programs, the State is requiring something of ELL students for which the State has failed to provide the proper foundation. The Court's finding that the AIMS test be enjoined for ELL students is based solely on the facts of this case, and the February 2000 Order, and is not to be construed as any broad characterization of whether or not the AIMS test has a disparate effect on limited English speaking students.

II. Defendant's Request for Court to Make a Ruling

Defendants allege that monies made available through No Child Left Behind ("NCLB") and other funds are now a significant part of the ELL landscape. Defendants argue that the Court should decide whether and to what extent those federal funds can be used in determining the adequacy of ELL funding in Arizona. Defendants assert that in their response to Plaintiffs' motion for injunction on January 9, 2002, they stated that the NCLB "will significantly affect public education in general and the provision of language acquisition programs." Defendants contend that the issue of whether HB 2010 should be evaluated by considering all available funding for ELL programs, including that provided by federal funds was not addressed by the Court. Defendants further argue that in the Court's January 28, 2005, Order, it did not say whether Federal funds may be considered in deciding whether the State has "appropriately and constitutionally" funded its ELL programs.

Plaintiffs contend that federal funding was addressed at the trial in this case and discussed in the Court's judgment.[7] Plaintiffs state that Defendants request for the Court to consider federal funding is an attempt to relitigate issues that the Court has already decided. Plaintiffs argue that statutorily, federal funds must supplement and not supplant the

---

[7] *Flores*, 172 F.Supp.2d at 1236-7 (D.Ariz.2000).

State's obligation.[8] Moreover, Plaintiffs argue if the Court were to take time to issue an advisory opinion in this matter, its only outcome would be more delay and would not resolve any thing at all.

The Court agrees. The Court sees this issue as a request to issue an advisory opinion and declines to do the same.

Plaintiffs state that the Court should award their attorney's fees due to Defendant's non-compliance with the Court's judgment on January 28, 2000. Plaintiffs allege that for nearly six years the State has done nothing to comply with the Court's judgment. Plaintiffs argue that after the Court ordered the State to perform a cost study in October of 2000, the State took no action even though the cost study was performed. Also, Plaintiffs contend that they returned to the Court to establish a deadline for compliance in August of 2004 however, the cost study was not submitted. As a result, Plaintiffs state they returned again to the Court in an effort to ensure compliance. Finally, Plaintiffs argue that the State has failed to comply and request the Court to award attorney's fees and costs for the work related to enforcement of the Court's orders that they have performed on this case since judgment was issued on January 24, 2000.

---

[8] No Child Left Behind Act, P.L. 107-110, Secs. 1114(a)(2)(B), 3115(g).

LEGAL STANDARD

The Court has jurisdiction over the present action against Defendants by its order dated January 28, 2005, and under the Declaratory Judgment Act, A.R.S. §§ 12-1831 *et seq.*, A.R.S. § 12-864, and Rule 65(d) of the Federal Rules of Civil Procedure.

"Courts have inherent power to enforce compliance with their lawful orders through civil contempt." *Shillitani v. United States,* 384 U.S. 364, 370, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966). This power has been relied on to hold city and state legislatures in contempt. *See Spallone v. United States,* 493 U.S. 265, 276, 110 S.Ct. 625, 107 L.Ed.2d 644 (1990). "When a district court's order is necessary to remedy past discrimination, the court has an additional basis for the exercise of broad equitable powers." *Id.* However, these powers are not unlimited, and the Court is obliged to use the "least possible power adequate to the end proposed." *Id. quoting Anderson v. Dunn,* 6 Wheat. 204, 19 U.S. 204, 231, 5 L.Ed. 242 (1821). In devising a remedy, the Court must take into account the interests of State and local authorities in managing their own affairs, consistent with the Constitution. *Id.*

A district court has the power to adjudge in civil contempt any person who willfully disobeys a specific and definite order of the court. *Gifford v. Heckler,* 741 F.2d 263, 265 (9th Cir.1984). However, the contempt does not need to be willful and there is no good faith exception to the requirement of obedience to a court

order. *In re Dual-Deck Video Cassette Recorder Antitrust Litigation,* 10 F.3d 693, 695 (9th Cir.1993). A court has wide latitude in determining whether there has been contemptuous defiance of its order. *Gifford,* 741 F.2d at 266. A party should not be held in contempt if the "action appears to be based on a good faith and reasonable interpretation of the [court's order]." quoting *Vertex Distrib., Inc. v. Falcon Foam Plastics, Inc.,* 689 F.2d 885, 889 (9th Cir.1982). "Substantial compliance" with the court order is a defense to civil contempt. *Id.* The party alleging civil contempt must demonstrate the alleged contempt or violation of the court's order by clear and convincing evidence, not a preponderance of the evidence. *Id.* While the set of rules the court should use is easy to articulate, they may be difficult to apply. *Id.* The court should determine (1) that the party violated the court order, (2) beyond substantial compliance, (3) not based on a good faith and reasonable interpretation of the order, (4) by clear and convincing evidence. *Id.*, The record in this case supports that the Plaintiffs have passed this test.

DISCUSSION AND ANALYSIS

It is therefore the judgement of the court that the State has failed to comply with this Court's Order, and the Court will apply appropriate sanctions. The Plaintiffs have asked the Court to enjoin the State from receipt of federal highway funds as a sanction. The Court does not think this is an appropriate remedy.

The American Council of Engineering Companies of Arizona and Associated General Contractors of America, Arizona Chapter ("Intervenors") argue that Plaintiffs' motion for sanctions are not related to Arizona's highway funding. Also, Intervenors assert that the Plaintiffs' request for sanctions is made without consideration or respect of the limitations on the authority of the Court both as a matter of applicable law, inherent powers of equity, and the Constitution of the United States. Intervenors further argue that if the relief sought by Plaintiffs is granted, it would have a direct, immediate, and significant impact on Intervenors' member firms.

The Court must use the least possible power to the end proposed. The remedy the Plaintiffs request, enjoining federal highway funds, has no relationship to ELL students. If the Court were to enjoin federal educational funds, it would not only harm ELL students, it would hurt all students in the Arizona school system. Therefore, the Court will **DENY** Plaintiffs' request to enjoin the receipt of federal highway funds as a sanction.

During the October 2005 hearing, mention was made whether someone should go to jail. Under the circumstances, this is not an appropriate remedy at this time.

The Court has been asked by the Plaintiffs to enjoin the state from requiring that ELL students be subject to passing the AIMS test as a graduation requirement until such time as ELL student's education

have been funded at an appropriate level and have had appropriate time to benefit from such funding.

The state of Arizona has spent a great deal of time dealing with the AIMS situation and revised the test several ways to increase the passage rates of those students who are required to take it. However, the State has failed to comply with the Court's judgment for almost six years by under-funding ELL programs, which would provide ELL students with the necessary tools to pass the AIMS test. The State's offering tutoring outside the classroom and other things to all students for the purpose of passing the AIMS test does not remedy the fact that the under-funded ELL programs deprive ELL students of an equal opportunity to pass the AIMS test in the first instance.

The Court therefore **GRANTS** the injunction for relief requested by the Plaintiff and orders that ELL students not be required to pass the AIMS test to secure their diploma until the State has properly funded ELL programs and there has been sufficient time to allow ELL students to compete equally on the test.

SANCTIONS

Accordingly,

IT IS ORDERED that until Defendants fully comply with the mandates of the February 2000 Order, the State is enjoined from requiring ELL

Students to pass the AIMS test as a requirement for graduating from high school.

FURTHER, it is ordered that upon full compliance, the State may file a motion to lift the injunction and present evidence as to the reasonable time ELL students should remain exempt from the AIMS test as a requirement for high school graduation.

FURTHER, it is ordered that the legislature has 15 calendar days after the beginning of the 2006 legislative session to comply with the January 28, 2005 Court order. Everyday thereafter and for the ensuing 30 days that the State fails to comply with this Order, a **$500,000** per day fine for the next 30 days will be imposed until the State is in compliance.

FURTHER, if after that, the State has still not complied, the Court will impose a **$1 million dollar** per day fine for the following 30 days until the State is in compliance.

FURTHER, if after that, the State has still not complied, the Court will impose a $1.5 million dollar per day fine until the end of the 2006 legislative session.

FURTHER, if after that, the State has not complied by the end of the 2006 legislative session, a **$2 million dollar** per day fine will be imposed until the State has complied with the January 28, 2005 Court order.

FURTHER, it is therefore ordered that Defendants' are to pay Plaintiffs' reasonable attorney's fees

for the time period beginning after the January 28, 2005, Court order. Plaintiffs counsel is to submit calculations for said attorney's fees and a proposed order for the Court to approve.

---

172 F.Supp.2d 1225

United States District Court, D. Arizona.
Miriam FLORES, individually and as a parent of Miriam Flores, a minor child, et. al., Plaintiffs,
v.
State of ARIZONA, et. al., Defendants.
No. 92-596-TUC-ACM.

Jan. 24, 2000.

Lynne Christensen Adams, Office of Atty. Gen., Phoenix, AZ for Eugene Hughes, David Silva, Claudine Bates Arthur, John Hosner, Ken Bennett, Ray Kellis, Morrison Warren, State of Arizona.

Elliott Talenfeld, Lynne Christensen Adams, Office of Atty. Gen., Phoenix, AZ, Gretchen Schneidau, Office of Atty. Gen., Phoenix, AZ, for Jim Allman.

Timothy Michael Hogan, Arizona Ctr for Law in the Public Interest, Phoenix, AZ, for Miriam Flores, Rosa Rzeslawski.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

MARQUEZ, Senior District Judge.

August 20, 1992, Plaintiffs filed this action seeking declaratory relief against the Defendants for failing to provide limited English proficient (LEP) children with a program of instruction calculated to make them proficient in speaking, understanding, reading, and writing English, while enabling them to master the standard academic curriculum as required

of all students. *See Lau v. Nichols,* 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974) (failure to provide English instruction to students of Chinese decent who do not speak English denies them a meaningful opportunity to participate in public education and violates Title VI, 42 U.S.C. § 2000d). Plaintiffs charge that the Defendants fail to adequately fund, administer and oversee the public school system in districts enrolling predominantly low-income minority children, and that Defendants allow these schools to provide less educational benefits and opportunities than those provided to students who attend predominantly anglo-schools.

On August 28, 1997, this Court certified the case as a class action law suit and defined the class as follows: all minority "at risk" and limited English proficient children (LEP), now or hereafter, enrolled in Nogales Unified School District (NUSD), as well as their parents and guardians." (Order filed August 28, 1997 at 4-5.)

After an arduous history, which has previously been described in detail (Order filed April 14, 1999 at 7-13), the Court dismissed Plaintiffs' claim under 42 U.S.C. § 1983, but held that Plaintiffs' LAU claims could proceed under the Equal Education Act of 1974

(EEOA), (Title 20 U.S.C. § 1703(f)),[1] and that Plaintiffs' disparate impact claim could be brought under the implementing regulations. (34 C.F.R. Part 100), for Title VI of the Civil Rights Act of 1964, (42 U.S.C. § 2000d).[2] (Order filed April 14, 1999 at 2-7.) The Court set the matter for trial to determine whether Defendants fail to provide adequately for the instruction of LEP students and other "at risk" minority students attending public school systems in districts like NUSD. (Order filed April 14, 1999 at 11.)

The Court held a three-day bench trial, beginning on August 16, 1999. The parties presented live testimony and stipulated to admit into evidence all exhibits. The trial addressed only two specific issues because the parties reported that a Consent Decree

---

[1] The EEOA provides as follows:

> No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by –
>
> (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

20 U.S.C. § 1703.

[2] Title VI provides as follows:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d.

disposed of the majority of Plaintiffs' LAU claims. (Minute Entry August 18, 1999.) The following issues were tried: 1) whether or not Defendants' adequately fund and oversee the LAU program in NUSD, and 2) whether or not the AIMS test disparately impacts minority students at NUSD. Plaintiffs' Second Amended Complaint did not include the AIMS challenge; nevertheless, the Court heard the parties' arguments and finds that Plaintiffs failed to present evidence at trial to make a prima facie case of disparate impact. Accordingly, the Court considers the evidence regarding academic performance only as it is indicative of deficiencies in Plaintiffs' education.

The cause having come to trial, before the Court sitting without a jury, with Timothy M. Hogan and William Morris appearing as counsel for Plaintiffs, and Roger W. Hall appearing as counsel for Defendants, the State of Arizona, et. al.;

The Court having heard the testimony and having examined the proofs offered by the parties, and having heard the arguments of counsel and being fully advised herein, the Court now finds generally in favor of Plaintiffs and against Defendants, and hereby makes the following special Findings of Fact and Conclusions of Law pursuant to Federal Rules of Civil Procedure, Rule 52(a) and (c) which constitutes the decision of the Court herein:

FINDINGS OF FACT

To the extent these Findings of Fact are also deemed to be Conclusions of Law, they are hereby incorporated into the Conclusions of Law that follow.

1. The public elementary and secondary schools of Arizona, including NUSD, are financed by a combination of revenues from local, county, state and federal sources. Federal funding sources make up a very small percentage of total funds for Arizona's schools. For example in 1991-1992, federal revenues were only 6.5% of the State's total school revenues. In main part. Arizona School Districts are funded from local and state revenues. (Ps' Ex. 16: Borcher Report (1993).)

2. The minimum level of funding per student or (Base Revenue Control Limit (BRCL)) derives from a 1979-80 cost study which determined the amount of money being spent per student at that time. Transportation costs (Transportation Revenue Control Limit (TRCL)) are added to the BRCL to derive the revenue control limit (RCL) for each district, and then there are add-ons for capital outlay. There are two different funds for capital outlay. One is the Capital Outlay Revenue Limit (CORL) which may be spent on capital expenditures or shifted to maintenance and operations. The other is the Capital Levy Revenue Limit (CLRL) which is exclusively for capital improvements. (Day 1, TR at 4-50); (Ps' Ex. 16: Borcher Report (1993).)

3. Each district has a Revenue Control Limit (RCL), which is the sum of the BRCL and the TRCL (transportation funding, *see* ¶ 4). These funds and any CORL funds (capital outlay funding, *see* ¶ 4) which the district has shifted to operations make up the State guaranteed amount of operational funding for a school district. (Day 1, TR at 4-50); (Ps' Ex. 16: Borcher Report (1993).) Recent legislative changes to the State financing scheme, known as Students FIRST, provides more money for maintenance of buildings and additional technology and instructional materials. Funding increases from Students FIRST are largely capital in nature and NUSD did not experience any increase in its operational funding. (Day 1, TR at 31-34.)

4. The State's financing scheme is basically a foundation program, which means that the State guarantees a minimum level of funding for each student to ensure that each student receives a basic education.

5. The base level amount in 1992-1993 was $2,410.26 per student. (Day 1, TR at 35); (Ps' Ex. 16: Borcher Report (1993) at 6.) The legislature has increased the base level amount on an average of nine-tenths of a percent a year. (Day 1, TR at 35-36.) The inflation rate during the eight years has been an average of 2.8% a year, or toughly three times more than funding increases by the State. (Day 1, TR at 35-36.) The current base level amount is approximately $3,174.11. (Day 1, TR at 17.)

6. Beginning in 1991-1992, the State legislature stopped funding the full inflation rate. In 1991-1992, the inflation rate was 4.1%, but the State only gave an increase to the base support level of 1%. (Day 1, TR at 29.)

7. In 1999-2000, the legislature increased the basic aid equal to the gross national product (GNP) which was 1.1%, but because of population increases, the money went towards new student expenses rather than for increased aid per student. (Day 1, TR at 30.)

8. The State's finance formula increases the base amount by weighing certain factors such as type of student, experience of teaching faculty, size and type of school district, to derive the Base Revenue Control Limit (BRCL). (Day 1, TR at 4-50); (Ps' Ex. 16: Borcher Report (1993).) The amount of money school districts, such as NUSD, receive for maintenance and operations depends on the number of students in the district multiplied by the base levels set by the State.

9. The weighing factor for LEP was put in place in 1989-90 by the State legislature and is based on a cost study performed in 1987-88, which showed that on the average school districts were spending $450 per LEP student. (Ps Ex. 31: Review of Resources and Costs Associated with Services for LEP Students in Arizona by Arias and Shupp, March 12, 1998, at 23; *see also* Day 3. TR at 78; Romero testimony (LEP Cost Study of 1987-88 estimated an average total cost of $424 per student for LAU programs based on the

amount of actual dollars the various districts were reportedly spending in 1987-1988 towards their respective programs.))

10. Ralph D. Romero, Director of Operations of the Division of Academic Support, previously Director of Academic Support, testified as to the possible deficiencies and problems with the LEP Cost Study prepared by the Department of Education in 1987-1988. (Day 3, TR at 66.) The cost study is not reflective of the actual cost of operating a successful LAU program for the following reasons: 1) the cost figures reported by the districts may not have been final audit figures and could have been subject to change. (Day 3, TR at 67); 2) there may have not been uniformity in data collection, meaning that the districts may have differed in the way they categorized various program costs (for example, districts could have employees performing the same functions, i.e., administrative tasks, but categorized them differently, i.e., as teachers instead of as administrative staff) (Day 3, TR at 69); 3) the cost figure was determined by adding the year-to-date cost to an estimated cost for the program to the end of the fiscal year, (Day 3, TR at 71); 4) the cost of providing LEP students that are more proficient in the English language will be less than running a program in a district like NUSD where there are large concentrations of very limited English proficient students, (Day 3, TR at 72-73); 5) the districts operate many different types of LAU programs, including: English as a Second Language (ESL), bilingual transitional, and bilingual-bicultural,

(Day 3, TR at 73); 6) some district LAU programs cost a lot per student and some cost very little, which suggests that the programs are very different. (Day 3, TR at 74); 7) there was no assessment made between the cost of a program and the quality of the program; and 8) certain conditions were not considered that may contribute additional significant costs. (Day 3, TR at 78).

11. The State has never updated nor revised the 1987-1988 LAU cost study. The State has not conducted a more accurate assessment of LAU program costs. The State legislature has ordered another cost study to be done this year. (Day 3, TR at 81.) The legislature created the English as a Second Language (ESL) and Bilingual Education Study Committee to conduct the cost study as follows: 1) determine the cost of educating LEP students versus what is currently being spent; 2) try to determine the best practices in bilingual education and ESL; 3) look at ways to improve bilingual education in the school districts across the state, and 4) determine if programs are in compliance with state and federal mandates. (Day 3, TR at 81.)

12. In 1989-90, the LEP weight was .02, which meant that schools received approximately $50 more for each LEP student. In 1991-1992, the State legislature increased the weight to its current amount, .060, which results in approximately $150 being apportioned for each LEP student, (Day 1, TR at 25), and results in an increased BRCL for each LEP student A.R.S. § 15-943. For example, if the base level per

student is $2,410.26, NUSD would receive an additional $144.62 for each LEP student. (Day 1, TR at 4-50); (Ps' Ex. 16: Borcher Report (1993).) The State provides school districts with funding in the form of block grants. There are no limitations or restrictions placed on the funding so a district may use the money as it sees fit. (Day 1, TR at 9, 13.) For example, a district may spend only $50.00 per LEP student on LAU programs, instead of the $150.00 allocated by the State, or it may exceed the State's minimum and spend more per LEP student. (Day 1, TR at 13.)

13. The State financing scheme provides for a portion of the school revenues to be raised at the district and county level. The State contributes the remainder. The local share is determined by the relative wealth of the district, as measured by assessed valuation per student, and then the State makes up the difference. (Ps' Ex. 16: Borcher Report (1993).) The tax rate is specified by the State legislature, (Qualifying Tax Rate) (QTR), which for a unified school district, like NUSD, is $4.40 per $100 of assessed property valuation (AV) in the school district. (Day 1, TR at 4-50); (Ps' Ex. 16: Borcher Report (1993).)

14. NUSD determines its financial responsibility as follows: 1) NUSD assessed valuation of $90,992.662 for 1998; 2) NUSD has 5,889 students; 3) assessed valuation per student (A-V per student) is determined by dividing the assessed valuation for NUSD by the number of students in NUSD ($90,992,662 / 5,889 = $15,451.29 A-V per student); 4) NUSD's contribution per student is calculated by

multiplying the A-V per student by the QTR for NUSD (($15,451.29 / 100)[3] X $4.40 = $679.86 per student); 5) the State's contribution per student is calculated by subtracting NUSD's contribution per student from the base support level, which is currently $3,174.11 per student ($3,174.11-$679.86 = $2,494.25). Total contributions are calculated by multiplying the respective per student contributions by the number of students (($2,494.25 X 5,889 = $14,688,638.00 in state funding) ($679.86 X 5.889 = $4,003,695.50 in local funds)). (These figures are examples only and do not reflect the exact per student allocation which would be adjusted by the weighting factors, pursuant A.R.S. § 15-943.) (Day 1, TR at 4-50); (Ps' Ex. 16: Borcher Report (1993).)

15. Above and beyond the State guaranteed minimum, School districts can increase their operational budgets by up to 10% more than the RCL, by voter approved spending changes known as "overrides." (Day 1, TR at 4-50); (Ps' Ex. 16: Borcher Report (1993).)

16. A high-valuation district can generate override money with little additional tax burden to its residents as compared to low-valuation districts. For example, NUSD can raise $1,600,000.00 in an override, based on their assessed valuation of $90,992,662.00, by imposing a tax of $1.83 on every $100 of assessed value; whereas, Catalina Foothills

---

[3] QTR = $4.40 per $100 of assessed value.

Unified School District which is a high-valuation district, can raise the $1,600,000 00 by imposing a tax of $.56 on every $100 of its $285,270,808.00 assessed valuation. (Day 1, TR at 4-50); (Ps' Ex. 16: Borcher Report (1993).)

17. The impact of financing LAU programs via an override is greater in low-valuation districts because they have heavier concentrations of LEP students as compared to high-valuation districts. For example, based on 1998 figures, NUSD could increase LEP funding by $350.00 per student, by passing an override for $1.83 per $100 of assessed value to raise $1,662,500.00 because it has 4,750 LEP students; whereas, Catalina Foothills Unified School District could increase its funding by $350.00 per student, by passing an override for a $.07 to raise $21,000.00 because it only has 60 LEP students. (Day 1, TR at 27-28.)

18. Dr. Sidney D. Borcher's Report sampled 18 districts. He found that twice as many high assessed valuation districts (12) have passed overrides as compared to low assessed valuation districts (6), (Ps' Ex. 16: Borcher Report (1993) at 24, 25: Table 13), and that only high assessed valuation districts had overrides generating funding to the maximum limit. (Ps' Ex. 16: Borcher Report (1993) at 19, 25 Table 13.) Dr. Borcher testified that lower wealth districts have a hard time passing an override because they already have a very high tax rate, and even though the constituency maybe sees the need for better education, they just say we can't afford it. (Day 1, TR. at 47.)

19. NUSD does not have an override. (Day 1, TR at 26.)

20. Without a voter approved override, NUSD can only increase LEP funding by shifting money from non-LEP student apportionments. For example, funding NUSD's LEP program at $450 per LEP student results in a loss of $270.00 to each regular student, (Day 1, TR at 37), from the regular program's operating budget. The shifting of funds to LEP programs, therefore, impacts all students because it results in a lower base level of financial support for all students, including LEP students. (Day 1, TR at 38). This is typical for a low assessed valuation district where on the average it will take approximately $112.00 to generate $450 per LEP student; whereas, a high assessed value district could accomplish the same level of funding with only a $13.00 loss per student. (Ps' Ex. 16: Borcher Report (1993) at 32; Table 18.)

21. Low-valuation districts also have heavier concentrations of "at risk" students than high-valuation districts. An "at-risk" student is a student who usually has some socioeconomic type of impact that would cause them to be "at risk" of not learning. (Day 1, TR at 38-39.) The most common accepted measurement in education for determining "at risk" students is the number of students that qualify for free or reduced lunches, which is primarily an economic measurement. (Day 1, TR at 39.) The State does not provide funding for "at risk" students. (Day 1, TR at 39.) "At risk" student programs are not

included in the list of special needs weighted for additional funds by the State. A.R.S. § 15-94-43. Federal programs, primarily through Title 1, provide funding for "at risk" students and this funding makes up approximately 4% of the State's total budget for Arizona schools. (Day 1, TR at 36, Day 1. TR at 40; BR at 3.)

22. Districts with high enrollments of LEP students also tend to have a high percentage of reduced lunch programs. (Ps' Ex. 16: Borcher Report (1993) at 31: Table 17). This is not always true. (Day 1, TR at 45.) For example, inner-city schools have "at risk" students who speak only English and receive free and reduced lunches. (Day 1, TR at 45.) Responding to questioning by the State's attorney, Dr. Borcher testified that the correlation exists in NUSD, where LEP students are the same students that make up the bulk of the "at risk" student population enrolled in the free-lunch programs, because these students come from non-English speaking immigrant families from Mexico whose parents have low paying jobs. (Day 1, TR at 43-44.)

23. Ann Elizabeth Doan, Director of Bilingual Education and Curriculum for NUSD, testified that in 1992, the Office for Civil Rights conducted a LAU compliance review which resulted in a lengthy report on the status of NUSD's LAU programs and a LAU compliance agreement (OCR Compliance Agreement) to remedy the following problems: 1) clean up the process of identifying LEP students so that state accepted measures were being used; 2) place the

student in a LAU program, when the child was identified as a LEP student; 3) the LAU program could be bilingual education. English as a Second Language (ESL), or an individual education program (IEP); if the LEP student was a special education student, LAU provisions had to be included in the student's special education LEP; 4) monitor LAU program to ensure program sufficiency and to show that the program actually improves the student's academic level and English skills; 5) review LAU program exiting process; and 6) follow up exited LEP students to insure that students continue to work at grade level. (Day 2, TR at 7-8.)

24. A key element to implementing the OCR Compliance Agreement required NUSD to secure qualified LEP teachers. (Day 2, TR at 7-8.)

25. Teachers are qualified LEP instructors if they have a bilingual endorsement. This endorsement requires a teacher to know Spanish. To teach in a bilingual classroom, the teacher must pass a test at a state university which shows they have an academic level of Spanish. (Day 2, TR at 23.)

26. Teachers are qualified LEP instructors if they are ESL endorsed. The teacher does not particularly have to know Spanish, but at some point in time should have learned a second language, such as French, German, etc., so that the teacher knows the process that children go through to learn a second language. (Day 2, TR at 23.)

27. NUSD has adopted a bilingual education program and an ESL program. (Day 2, TR at 10.) The goal of NUSD's bilingual program is for students to graduate from highschool proficient in both English and Spanish, meaning able to read, write and speak both English and Spanish. (Day 2, TR at 10.) The goal of the ESL program is to teach enough English so that the student can be mainstreamed into a grade level classroom and function in English with additional support, so that the student maintains his or her grade level in content area skills. (Day 2, TR at 17.)

28. The State provides that the decision regarding which type of LAU program to implement is made by the school, so some schools in NUSD have adopted bilingual programs, and others use ESL programs. (Day 2, TR at 25.)

29. NUSD has six elementary schools, two middle schools, one highschool, and an alternative highschool. (Day 2, TR at 9.) The student population of approximately 5,889 students is approximately 95% Hispanic. (Day 2, TR at 15.) Approximately, 60% of the student body is LEP and 63% receive free and reduced lunches. (P's Ex. 16: Borcher Report (1993) at 31: Table 17.)

30. There are approximately 2,500 to 2,800 students enrolled in NUSD elementary schools. Approximately, 80% of the elementary students are classified as LEP, and approximately 95% of LEP

students are from Mexican-American homes. (Day 2, TR at 9, TR at 15.)

31. NUSD elementary schools use a transitional bilingual education model. Students which mainly speak Spanish are placed in classrooms where they're taught to read and do math in Spanish while they're learning English. There are special classes in kindergarten through 6th grade to teach English. As soon as a student has command of oral English, he or she is put in an all English program, (Day 2, TR at 10), even though the child may not be academically literate in English. In other words, a student is still LEP because he or she cannot read or write proficiently in English, but once oral skills are acquired the student is mainstreamed.

32. Ideally, all LEP students not in ESL classes are supposed to be taught in the mainstream classrooms by LEP endorsed teachers, with half the teachers being bilingual and the other half being ESL endorsed. Between 500 to 1,000 of the 2,700 elementary students are not with endorsed teachers, so the schools do a lot of student-teacher exchanging to enable students to be with an endorsed teacher at least for some part of each day. (Day 2, TR at 11.)

33. The typical total enrollment in a primary classroom to which LEP students are assigned ranges from 20 students, which is good, to 30 students in a classroom. NUSD cannot reduce LEP class sizes because there are not enough classrooms and there are not enough teachers. (Day 2, TR at 12-13.) To

adequately implement the transitional bilingual education program at the elementary level, NUSD needs at least 60 more teachers with either bilingual or ESL endorsements. (Day 2, TR at 14.)

34. There are approximately 1,500 students enrolled in NUSD middle schools. Approximately, 70% of the middle school students are classified as LEP, and approximately 95% of the LEP students are from Mexican-American homes. (Day 2, TR at 15.)

35. NUSD middle schools use an ESL model. (Day 2, TR at 15.) The program focuses on "newcomers," meaning students who have recently immigrated from Mexico. (Day 2, TR at 16.) There are approximately 100 "newcomer" students. These students are placed in self-contained ESL classrooms most of the day to learn English. At the same time, they're assigned to social studies, science, and math teachers that have some training in sheltered English instruction to learn the content areas and at the same time develop English language skills. (Day 2, TR at 16); (Day 2, TR at 30.) There are also LEP students who have been in the district one to four years, but NUSD does not have enough qualified teachers to provide all LEP students with LAU instruction. Therefore, it focuses on teaching the "newcomers" English. (Day 2, TR at 19.)

36. The majority of LEP students in NUSD middle schools are *not* in ESL programs, but are mainstreamed because the State allows students who can communicate orally in English to be placed in

mainstream, English only classrooms. These students are LEP because they are not English literate; they do not read nor write at or near grade level. They could be one, two, three, even four or five years behind their peers, but according to the State they don't belong in an ESL classroom. (Day 2, TR at 17.)

37. If mainstreamed, these LEP students require English language support in their mainstream classroom. The mainstream classroom teachers should be language endorsed so that they are trained in different strategies, such as sheltered English and cooperative learning, to provide language support for the students who are learning content area skills. (Day 2, TR at 18.) Mainstreamed LEP students in NUSD middle schools do not receive any English language development instruction in the course of a given school day. (Day 2, TR at 20.)

38. To comply with State regulations, NUSD does a lot of student-teacher exchanging so that at some part of the day the LEP students will have a teacher with a language endorsement, who can provide additional support. "Additional Support," however, is not defined. It doesn't mean specifically English language development. If a student is slipping academically, there should be knowledge that the student is LEP, and the teacher should provide either extra tutoring or adapt the instruction for that student. NUSD doesn't know whether this actually happens, but it could happen during the one period per day that the student is with the endorsed teacher. (Day 2, TR at 20-22.)

39. NUSD has approximately 300 middle school teachers. Only 140 are language endorsed; 160 have no endorsement. Over half of NUSD's teachers are not qualified to work with NUSD's LEP students. (Day 2, TR at 32.) To actually implement the ESL program in its middle schools, NUSD needs approximately 160 more LEP endorsed teachers, with approximately half being bilingual and half being ESL endorsed. (Day 2, TR at 22.)[4]

40. There are approximately 1,800 students enrolled in the highschool. Approximately, 65-70% of the students are LEP, (Day 2, TR at 41-42), and approximately 95% of the LEP students are from Mexican-American families. (Day 2, TR at 15.)

41. There are approximately 130 students enrolled in the alternative highschool. Approximately, 98% of these students are LEP. (Day 2, TR at 41.)

42. The highschool uses an ESL model. New students that have been in the United States one to three years are placed in self-contained ESL classrooms where they learn English. "Newcomers," usually from Mexico, are generally advanced in math and science, so NUSD attempts to have qualified bilingual math and science teachers to teach grade level content area skills, while the students learn English (Day 2, TR at 42.) LEP students, new or

---

[4] On cross-examination, Ms. Doan testified that the 160 included the 60 teachers needed at the elementary level. (Day 2, TR at 103.)

otherwise, who have oral English skills are put into mainstream classrooms, even if they do not have English reading or writing abilities. (Day 2, TR at 43.) These students should be in classrooms with LAU endorsed teachers, (Day 2, TR at 44); (Day 2, TR at 49-50), but they are not, – there is no attempt to provide English language development instruction for these LEP students during a typical school day. (Day 2, TR at 45.)

43. LEP students that are not proficient in reading or writing English should be enrolled in what NUSD calls LEP English, or English B, to give them additional support in English language development. (Day 2, TR at 46.) Most of the non-newcomer LEP students at the highschool are, however, in mainstream English classes because there are not enough English B classes. To increase the English B classes, NUSD needs smaller class sizes, more classrooms, additional materials that are adapted to students learning the English language, and qualified teachers. NUSD's mainstream English teachers need to be trained to work with second language populations and help students develop their English literacy skills, not just their highschool English skills. (Day 2, TR at 47.)

44. Generally, only "newcomer" LEP students can enroll in bilingual math classes, but non-"newcomer" LEP students, having only oral English skills, should also be enrolled in these classes. NUSD students do very poorly on normed reference national tests in math because the tests are very content

specific, meaning they contain a lot of vocabulary and a lot of grade level reading. If a student is not literate in English, meaning they are not proficient at reading and writing English, they will need a lot of support through their math classes to pass the English-only math tests. (Day 2, TR at 48.)

45. NUSD's bilingual math class and science class are designed to impart content skills, not to develop English language skills. (Day 2, TR at 52-53.) There is no bilingual social studies class, but NUSD has social studies teachers with bilingual endorsements whom adapt their teaching to the needs of LEP students. (Day 2, TR at 53.) NUSD utilizes emergency teaching certificates to employ non-English speaking teachers to teach LEP students in the various content areas. These teachers are not tested to determine whether they are proficient in speaking, reading, and writing English. (Day 2, TR at 52.) These teachers teach in classes designed to make content areas understandable to LEP students. The classes are not designed to develop the students' English language skills. (Day 2, TR at 52-53.)

46. LEP students who have been exited from the LAU program are reassessed every two years. If the student scores at the 35th percentile or below on the English reading test, he or she should be placed in a class with a language endorsed teacher, but this is not possible in NUSD because of the teacher shortages at every grade level in NUSD. Instead, NUSD notifies the teacher that the student needs additional support, and the teacher is asked to help. If the

student is in a classroom with an untrained teacher, he or she will probably not get any help. (Day 2, TR at 79.)

47. There are teachers available in the labor market to hire, but NUSD does not have enough money to hire the number of teachers it needs. NUSD's current salary level is not competitive enough to keep endorsed teachers or to hire new endorsed teachers. (Day 2, TR at 33.)

48. Since entering into the OCR Compliance Agreement, staffing at NUSD has gotten worse. NUSD loses approximately 5 to 15 language endorsed teachers per year. Since the OCR Agreement, NUSD has lost approximately 40-60 language endorsed teachers, approximately 25 of these teachers taught at the elementary level. (Day 2, TR at 33-34.)

49. As part of the OCR Agreement, NUSD adopted a policy that all newly hired teachers be language certified or agree to obtain the endorsement within three years of their being employed by NUSD. (Day 2, TR at 36-37.) NUSD dropped the requirement because it was too burdensome, (Day 2, TR at 37), even though NUSD paid the cost of certification classes up front, and allowed the teacher to repay the district after he or she acquired provisional bilingual endorsement and received an $800.00 addendum from the district for having obtained the certification. (Day 2, TR at 37.) NUSD dropped the $800.00 addendum program when it dropped its requirement that

newly hired teachers become language endorsed. (Day 2, TR at 38.)

50. NUSD offers a $2,000 stipend per year for language endorsed teachers, but this primarily operates to attract new teachers because even with the stipend, language endorsed teachers can make more money in other districts. (Day 2, TR at 35.) Other school districts with higher salary ranges actively recruit NUSD's language endorsed teachers. (Day 2, TR at 35.) NUSD has a beginning salary schedule competitive with other school districts, but as time goes on, the increases for teachers that work for NUSD do not keep pace with increases available in other school districts, so NUSD may be able to attract teachers at the onset, but can't keep them. (Day 2, TR at 108.)

51. NUSD arranged with Northern Arizona University, Nogales satellite campus, to offer the six or seven courses required for bilingual and ESL endorsements. (Day 2, TR at 39-40.) The University of Arizona does not have a satellite program for teachers wishing to be certified by the U of A, and it is impractical to drive to Tucson after the school day is over to attend afternoon classes at the university. (Day 2, TR at 38.) NUSD contracts with Cal. State Fullerton to train its teachers on how to develop academic English and academic competence across the curriculum, the development of literacy in content areas, and the development of proper assessments for language minority students. The Cal. State Fullerton program does not provide language endorsements for

NUSD's teachers, but it does give them the type of training they need to work with LEP students. (Day 2, TR at 57.)

52. The State has never provided NUSD with any form of assistance designed to increase the number of newly hired teachers having language endorsements, nor provided any form of assistance designed to increase the number of current faculty who obtain language endorsements. Instead, the State tells other districts no look to NUSD for trained and qualified teachers. (Day 2, TR at 15.) Except for the State's base level funding for NUSD (Group B funds), the State does not provide any assistance regarding implementation or operation of NUSD's LAU program. Specifically, the State does not provide money, training programs or materials, or technical assistance. (Day 2, TR at 40-41, 53, 54, 58.)

53. Other LAU program inadequacies, besides qualified faculty, are as follows: 1) NUSD needs additional classroom space to reduce class size; 2) NUSD needs materials for both language groups; 3) NUSD needs to train its teachers to work with the LAU Program materials; 4) NUSD needs ESL materials, especially to teach language skills in content areas, such as English, social studies, science, and math; 5) NUSD needs to train its teachers to implement a special math program; 6) NUSD needs to train parents to help their children in the classroom; 7) NUSD needs to pay extra for its teachers to work after school hours with parents and students, and 8) NUSD must also provide transportation for after

school tutoring and parent training programs. (Day 2, TR at 59-61.)

54. Ms. Doan testified that NUSD spends more on its LAU programs than the amount of Group B money provided by State. (Day 2, TR at 64.) To acquire funding for the LAU program, NUSD robs from Peter to pay Paul. (Day 2, TR at 62.)

55. Ms. Doan has a budget of $16,000 to implement necessary upgrades to NUSD's LAU programs. (Day 2, TR at 63.) She prepared a budget totaling $500,000 to $700,000 to upgrade the LAU program to include the following: 1) NUSD would cover the cost for its teachers to acquire language endorsements; 2) NUSD would pay teachers to tutor students after school; 3) NUSD would hire outside people to tutor students; 4) NUSD would purchase LAU program materials, including testing materials to use to assess students; 5) NUSD would provide teacher training on the use of the LAU materials; and 6) NUSD would hire employees to conduct the testing, including the initial LEP assessment, reassessment, and the follow-up. (Day 2, TR at 62-63.)

56. NUSD receives the following federal grant money for LAU programs: 1) Nogales Highschool, last year of Title 7-five-year grant, which provides LEP students with language support to work at grade level; 2) Wade Carpenter Middle Academy of Technology, last year of Title 7-five-year grant, which provides $250,000 per year to the highschool and $300,000 a year to the middle school for staff training

and to get teachers language endorsed; 3) Wade Carpenter Middle School, first year of Title 7-two-year grant, which provides $125,000 per year to develop inner session programs for LEP students; 4) the alternative highschool has an academic and technology grant; 5) Lincoln Elementary, last year of Title 7-five-year grant which provides $310,000 per year for computers, teacher training and language endorsements. The federal government contracts directly with the individual schools for these grant programs. The schools must use the money as stipulated in the grant, and the district cannot use the money to supplement the regular LAU budget. (Day 2, TR at 65-69.)

57. The goal of all the federal grants is, number one, to develop the English skills of the student, and number two, to develop the academic skills of the students. At the end of this school year, NUSD will lose three of the federal LAU grants for a total dollar loss of between $800,000.00 and $1,000,000.00. (Day 2, TR at 69.) The consequences of these grants ending will be significant because the federal money has supported the acquisition of language endorsements for NUSD teachers and training for teachers that do not have endorsements. (Day 2, TR at 70.)

58. Securing new federal grants for LAU programs is unlikely because they are highly competitive. (Day 2, TR at 71.) Only about 10% of federal grant proposals across the country are funded. (Day 2, TR at 72.) There are no state funds to replace the

federal grants which are ending this year. (Day 2, TR at 71.)

59. NUSD finances its "at risk" programs through Title 1. (Day 1, TR at 38.) All NUSD schools qualify for Title 1 funds for "at risk" students. In districts like NUSD, which are below the poverty level, Title 1 funds must be used for school-wide improvements rather than targeted on "at risk" students. (Day 2, TR at 88); (Day 2, TR at 93-94, 96.) NUSD has school-wide Title 1 programs at all levels: elementary, middle school, and highschool. (Day 2, TR at 90-91.) At the elementary school level. Title 1 funds provide for all day kindergarten which enables the students to acquire academic skills at a faster pace; at the middle school level, the money goes to fund parent involvement programs, math and reading programs (Day 2, TR at 94); and the highschool spends money on parental involvement programs, tutoring for students, computer labs, and extended day classes (Day 2, TR at 95).

60. There is a direct correlation between the LEP student population and "at risk" students in NUSD. The State and NUSD have developed measurements for assessing the success of Title 1 programs. AIMS is one measurement the state uses to determine success, and it also uses an independent testing company to administer a normed reference test. (Day 2, TR at 96.) NUSD has had a transitional district assessment plan in place since 1994 to test reading, writing, and speaking in English and Spanish. The tests show that the Title 1 programs for "at

risk" students are succeeding slowly. (Day 2, TR at 97.) NUSD students are below grade level, so its not enough to make one year's progress in one year, the students must make more than one year's progress in one year to ever catch up. NUSD students have not been able to do that despite Title 1 efforts. (Day 2, TR at 97.)

61. The Court finds that because of the overlap between NUSD's LEP students and "at risk" students, the Title 1 "success" assessments are most likely reflective of NUSD's LAU program's success or lack thereof.

62. The OCR has not sent anybody to monitor NUSD regarding the success of its LAU programs since institution of the 1992 OCR Agreement. (Day 2, TR at 81.) The last State monitoring visit at NUSD was in 1993. (Day 2, TR at 83.) Prior to that, the State monitored NUSD in 1991. The OCR visit and the State's visit in 1991 resulted in significant improvements to NUSD's LAU program. (Day 2, TR at 83.)

63. The State implemented an active monitoring program in 98-99. The first spring semester of the academic year 1998-1999, the State monitored five school districts and is continuing the monitoring this semester so that approximately one district a month is monitored. The State believes that with year round school, it can continue monitoring during the summer. There are 460 districts. The State conducts onsite monitoring which takes about three days and

follow-up monitoring which is approximately two days. The State has sent a monitoring guide to each district to explain state compliance mandates. (Day 3, TR at 82-83.) The State has not yet monitored NUSD.

64. Plaintiff's expert Dr. Gene Glass testified that minority students fail standardized tests such as AIMS and Sanford 9 in dramatically larger proportions than anglo students. He based his opinions on data compiled for Phoenix Union Highschool District (PUSD), which is not at all similar to NUSD and, therefore, does not provide a meaningful comparison. While both schools have similarly high indices for "at risk" students, (Day 2, TR at 25), (Day 2, TR at 42), the two schools are however, entirely different. PUSD is a large urban school in a high assessed valuation district. PUSD has a racially diverse student body which is comprised of Anglo, Black and Hispanic students. NUSD is a low assessed valuation district. NUSD's student body is 95% Mexican-American, and only 1% of the students are Black. (Day 2, TR at 108.) NUSD has 63% of its student body in its free and reduced lunch program, and a corresponding LEP population of 60-70%. (P's Ex. 16: Borcher Report (1993) at 31: Table 17.) PUSD has approximately 40% of its student body in the free and reduced lunch program, but only has a LEP population of 7%. (P's Ex. 16: Borcher Report (1993) at 31: Table 17.) Plaintiffs' expert failed to consider these demographic differences and concluded that they were irrelevant. This approach made his testimony of little use to the Court for the purpose of establishing whether minority

students fail standardized tests because of their race, national origin, limited English proficiency, because they attend schools in low valuation districts, for some other socio-economic reason, or for some combination of all these factors.

CONCLUSIONS OF LAW

To the extent any of the Findings of Fact contain or include any Conclusions of Law, said Findings of Fact are incorporated herein by reference. Furthermore, this Court provided a detailed discussion of the applicable law in its prior Order of April 14, 1999, which is incorporated herein by reference.

A. LAU Resource Issue

1. The Court's inquiry is three-fold:

> The court's responsibility, insofar as educational theory is concerned, is only to ascertain that a school system is pursing a program informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy.
>
> The court's second inquiry would be whether the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school. We do not believe that it may fairly be said that a school system is

> taking appropriate action to remedy language barriers if, despite the adoption of a promising theory, the system fails to follow through with practices, resources and personnel necessary to transform theory into reality.
>
> . . . If a school's program, although premised on a legitimate educational theory and implemented through the use of adequate techniques, fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome, that program may, at that point, no longer constitute appropriate action as far as that school is concerned. . . .

(*See* Order filed April 14, 1999 at 15-16 (citing *Castaneda v. Pickard,* 648 F.2d 989, 1009-1010) (5th Cir.1981)).

2. Local school boards are responsible for the operation of schools, but they must comply with controls over financing and spending prescribed by the Arizona legislature. (Ps.' Ex. 16: Borcher Report (1993).)

3. The parties agree that the State of Arizona has prescribed, and NUSD has adopted, models that are generally regarded by experts as sound designs for effective LAU instruction. The State's system passes the first test under *Castaneda* in this regard.

4. For the State to adopt appropriate practices and allocate adequate resources, it must first establish minimum standards for providing LAU funding and program oversight. (*See* Order filed April 14, 1999 at 14 (citing *Roosevelt II,* 190 Ariz. 520, 950 P.2d 1141, 1145 (1997) (performing an equal protection analysis, the *Roosevelt* Court held that it could only determine the adequacy of the State's program once a minimum standard had been set))).[5]

5. The State has established minimum academic standards, which are promulgated as the revised Arizona Essential Skills (AES). The State developed a corresponding test for measuring attainment of the skills, which is the Arizona Instrument to Measure Skills (AIMS). The Arizona Essential Skills are the minimum standards which must be taught in all schools and which all students, including LEP students, must master.

6. The State has established a "minimum" base level amount for the LAU program of approximately $150.00 per LEP student, pursuant to the State's weighting of 0.060 under A.R.S. § 15-943. Since 1991-1992,

---

[5] *Roosevelt Elementary School District No. 66 et al. v. C. Diane Bishop,* (*Roosevelt I*) 179 Ariz. 233, 877 P.2d 806 (1994) (en banc), *appeal after remand. Hull v. Albrecht,* (*Roosevelt II*) 190 Ariz. 520, 950 P.2d 1141 (1997), *appeal after remand* (*Roosevelt III*) 192 Ariz. 34, 960 P.2d 634 (1998) (equal protection analysis applied to claim that Arizona's school financing scheme violated the General and Uniform Clause of the Arizona Constitution).

the State legislature has failed to account for inflation in its base level allocation for LEP students. The State's LAU program funding formula was derived from, but is less than the 1987-1988 estimate that an average LAU program costs at least $ 450.00 per LEP student. The State admits that the LAU program costs in the 1987-1988 study are unreliable, but the State has failed to update its 1987-1988 cost study, nor has the State conducted any other studies to more accurately determine the actual cost per student for LAU instruction. The Court finds that the $450 estimated LAU program cost, on which the State's minimum $150 appropriation is based, is arbitrary and capricious.

7. The State's minimum $150 appropriation per LEP student, in combination with its property based financing scheme, is inadequate and has resulted in the following LAU program deficiencies: 1) too many students in a class room, 2) not enough class rooms, 3) not enough qualified teachers, including teachers to teach ESL and bilingual teachers to teach content area studies, 4) not enough teacher aids, 5) an inadequate tutoring program, and 6) insufficient teaching materials for both ESL classes and content area courses.

8. The State does not provide any other forms of in-kind assistance to offset the base level deficiency. The State has not designed any programs, nor implemented any practices, nor committed any resources which would supplement or supplant district level services. The State has not assisted NUSD in

any way in increasing LAU endorsed teachers. Since 1992, the State has not provided any LAU monitoring or oversight to assist NUSD in improving its LAU program.

9. The State's minimum base level for funding LAU programs is arbitrary and capricious and bears no relation to the actual funding needed to ensure that LEP students in NUSD are achieving mastery of its specified "essential skills." *See* (Order filed April 14, 1999 at 14-15 (citing *Roosevelt II,* 950 P.2d at 1145 (dollar amount chosen by legislature is arbitrary and capricious because it bears no relation to actual need))). The State is currently conducting a study to more accurately assess LAU Program costs which might well provide a basis for the State to set a minimum base funding level per LEP student which would not be arbitrary and capricious.

10. Defendants are violating the EEOA because the State's arbitrary and capricious LAU appropriation is not reasonably calculated to effectively implement the LAU educational theory which it approved, and NUSD adopted.

11. Defendants are violating the EEOA because the State has failed to take appropriate action to remedy language barriers in NUSD, in that, despite the adoption of a recognized LAU program in NUSD, the State has failed to follow through with practices, resources and personnel necessary to transform theory into reality.

B. Title VI of the Civil Rights Act of 1964; 42 U.S.C. § 2000d

1. Plaintiffs allege a violation of Title VI's implementing regulations which prohibit any recipient of federal funding from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin." 34 C.F.R. § 100.3(b)(2). Under Title VI's implementing regulations, proof of discriminatory intent is not a prerequisite to a private cause of action against governmental recipients of federal funds. Proof of discriminatory effect suffices to establish liability under the regulations. (*See* Order filed April 14, 1999 at 17 (citing *Larry P. by Lucille P. v. Riles,* 793 F.2d 969, 981-82 (1984) (en banc), *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 986-987, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988).))

2. To establish a prima facie case of disparate impact, Plaintiffs must establish that the AIMS test will have a distinctly disproportionate and adverse impact on minority students in NUSD; the AIMS graduation test causes the disparity, and that the disparity falls on Plaintiffs because they are members of a protected group. Plaintiffs rely solely on the evidence presented by its expert witness, Dr. Glass, who testified that minority students in PUSD disproportionately fail standardized tests, like the AIMS

test, when compared to Anglo-students. The Court rejects this evidence as not being a relevant comparison for students in NUSD. Specifically, the evidence fails to establish the necessary causal link between the disparate impact of the tests and the Plaintiffs' minority status. The correlation that exists in NUSD between "at risk" students and LEP students destroys any race-based inferences that might otherwise be drawn. Based on the evidence presented at trial, the students at NUSD might very well fail the tests because they are low-income "at risk" students. Members in this group are not protected from discriminatory treatment. *See* Order filed April 14, 1999 at 19-20 (relying on *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1424 (9th Cir.1990) (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. at 985-988, 108 S.Ct. 2777) (to prove causation, plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group)). Plaintiffs fail to establish a prima facie case of disparate impact.

Accordingly,

IT IS ORDERED that the Court finds in favor of Plaintiffs on Count One of the Second Amended Complaint that Defendants are violating the EEOA, (20 U.S.C. § 1703(f)), and against Plaintiffs on the Title VI claim, (34 C.F.R. Part 100), (42 U.S.C. § 2000d), challenging the AIMS test.

IT IS FURTHER ORDERED that no further issues having been brought before this Court for disposition, the Clerk of the Court shall enter judgment accordingly.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIRIAM FLORES, individually and as a parent of Miriam Flores, minor child; ROSA RZESLAWSKI, individually and as a parent of Mario Rzeslawski, minor child,

Plaintiffs-Appellees,

v.

STATE OF ARIZONA and the ARIZONA STATE BOARD OF EDUCATION, and its individual members in their official capacities,

Defendants-Appellees,

THOMAS C. HORNE, Superintendent of Public Instruction,

Defendant-Appellant,

and

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES and PRESIDENT OF THE ARIZONA SENATE,

Intervenors.

No. 07-15603

D.C. No.
CV-92-00596-RCC
District of Arizona,
Tucson

MIRIAM FLORES, individually and as a parent of Miriam Flores, minor child; ROSA RZESLAWSKI, individually and as a parent of Mario Rzeslawski, minor child,

Plaintiffs-Appellees,

v.

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES and PRESIDENT OF THE ARIZONA SENATE,

Intervenors-Appellants,

and

STATE OF ARIZONA and the ARIZONA STATE BOARD OF EDUCATION, and its individual members in their official capacities, THOMAS C. HORNE, Superintendent of Public Instruction,

Defendants.

No. 07-15605

D.C. No. CV-92-00596-RCC
District of Arizona, Tucson

ORDER

Filed April 17, 2008

Before: Betty B. Fletcher, Marsha S. Berzon, and Johnnie B. Rawlinson, Circuit Judges.

ORDER

The full court has been advised of the petitions for rehearing en banc. No judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f). Judges Berzon and Rawlinson voted to

deny the petitions for rehearing en banc and Judge Fletcher so recommended.

The panel has voted to amend its opinion and to deny the petitions for rehearing with the following amendment.

The opinion filed February 22, 2008 and published at 516 F.3d 1140 is amended as follows:

On page 1178, add the following paragraph to footnote 52 following the last sentence of the footnote:

> Our conclusion is unaffected by 20 U.S.C. § 6321(d), which provides an exception to some federal fiscal requirements for a narrow class of state funds expended for programs benefitting disadvantaged children. Arizona receives funding from several other federal programs. We need not decide if § 6321(d) could ever affect the application of § 7902, because § 15-756.11(E)'s consideration of federal funds is not limited to funds covered by § 6321(d). So, even if the exception were relevant here, it would not excuse Arizona from complying with federal fiscal requirements which it does not cover and § 15-756.11(E) would thus still violate § 7902. In any event, it is far from clear, although we need not decide the matter, that the compensatory instruction funds would be covered by the exception in the first place. *See* 20 U.S.C. § 6321(d) (limiting the exception to "supplemental State . . . funds expended . . . for programs that meet the intent and purposes of this part"); *see also* 34 C.F.R.

§ 200.79 (defining the boundaries of the "intent and purposes" exception).

* * *

No further petitions for rehearing or rehearing en banc will be entertained. The mandate shall issue in due course.

STATUTORY PROVISIONS

UNITED STATES CODE

20 U.S.C. § 1703(f)

§ 1703. Denial of equal educational opportunity prohibited

No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by –

. . .

(f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

---

20 U.S.C. § 6311

§ 6311. State plans

(a) Plans required

(1) In general

For any State desiring to receive a grant under this part, the State educational agency shall submit to the Secretary a plan, developed by the State educational agency, in consultation with local educational agencies, teachers, principals, pupil services personnel, administrators (including administrators of programs described in other parts of this subchapter), other staff, and parents, that satisfies the requirements of this

section and that is coordinated with other programs under this chapter, the Individuals with Disabilities Education Act, the Carl D. Perkins Career and Technical Education Act of 2006, the Head Start Act, the Adult Education and Family Literacy Act, and the McKinney-Vento Homeless Assistance Act.

. . .

(b) Academic standards, academic assessments, and accountability

(1) Challenging academic standards

(A) In general

Each State plan shall demonstrate that the State has adopted challenging academic content standards and challenging student academic achievement standards that will be used by the State, its local educational agencies, and its schools to carry out this part, except that a State shall not be required to submit such standards to the Secretary.

(B) Same standards

The academic standards required by subparagraph (A) shall be the same academic standards that the State applies to all schools and children in the State.

(C) Subjects

The State shall have such academic standards for all public elementary school and secondary school children, including children served under this part, in subjects determined by the State, but including at least

mathematics, reading or language arts, and (beginning in the 2005-2006 school year) science, which shall include the same knowledge, skills, and levels of achievement expected of all children.

(D) Challenging academic standards

Standards under this paragraph shall include –

(i) challenging academic content standards in academic subjects that –

(I) specify what children are expected to know and be able to do;

(II) contain coherent and rigorous content; and

(III) encourage the teaching of advanced skills; and

(ii) challenging student academic achievement standards that –

(I) are aligned with the State's academic content standards;

(II) describe two levels of high achievement (proficient and advanced) that determine how well children are mastering the material in the State academic content standards; and

(III) describe a third level of achievement (basic) to provide complete information about the progress of the lower-achieving children toward

mastering the proficient and advanced levels of achievement.

. . .

(2) Accountability

(A) In general

Each State plan shall demonstrate that the State has developed and is implementing a single, statewide State accountability system that will be effective in ensuring that all local educational agencies, public elementary schools, and public secondary schools make adequate yearly progress as defined under this paragraph. Each State accountability system shall –

(i) be based on the academic standards and academic assessments adopted under paragraphs (1) and (3), and other academic indicators consistent with subparagraph (C)(vi) and (vii), and shall take into account the achievement of all public elementary school and secondary school students;

(ii) be the same accountability system the State uses for all public elementary schools and secondary schools or all local educational agencies in the State, except that public elementary schools, secondary schools, and local educational agencies not participating under this part are not subject to the requirements of section 6316 of this title; and

(iii) include sanctions and rewards, such as bonuses and recognition, the State will use to hold local educational agencies and public elementary schools and secondary schools accountable for student achievement and for ensuring that they make adequate yearly progress in accordance with the State's definition under subparagraphs (B) and (C).

(B) Adequate yearly progress

Each State plan shall demonstrate, based on academic assessments described in paragraph (3), and in accordance with this paragraph, what constitutes adequate yearly progress of the State, and of all public elementary schools, secondary schools, and local educational agencies in the State, toward enabling all public elementary school and secondary school students to meet the State's student academic achievement standards, while working toward the goal of narrowing the achievement gaps in the State, local educational agencies, and schools.

(C) Definition

"Adequate yearly progress" shall be defined by the State in a manner that –

(i) applies the same high standards of academic achievement to all public elementary school and secondary school students in the State;

(ii) is statistically valid and reliable;

(iii) results in continuous and substantial academic improvement for all students;

(iv) measures the progress of public elementary schools, secondary schools and local educational agencies and the State based primarily on the academic assessments described in paragraph (3);

(v) includes separate measurable annual objectives for continuous and substantial improvement for each of the following:

(I) The achievement of all public elementary school and secondary school students.

(II) The achievement of –

(aa) economically disadvantaged students;

(bb) students from major racial and ethnic groups;

(cc) students with disabilities; and

(dd) students with limited English proficiency;

. . .

(E) Starting point

Each State, using data for the 2001-2002 school year, shall establish the starting point for measuring, under subparagraphs (G) and (H), the percentage of students meeting or

exceeding the State's proficient level of academic achievement on the State assessments under paragraph (3) and pursuant to the timeline described in subparagraph (F). The starting point shall be, at a minimum, based on the higher of the percentage of students at the proficient level who are in –

(i) the State's lowest achieving group of students described in subparagraph (C)(v)(II); or

(ii) the school at the 20th percentile in the State, based on enrollment, among all schools ranked by the percentage of students at the proficient level.

(F) Timeline

Each State shall establish a timeline for adequate yearly progress. The timeline shall ensure that not later than 12 years after the end of the 2001-2002 school year, all students in each group described in subparagraph (C)(v) will meet or exceed the State's proficient level of academic achievement on the State assessments under paragraph (3).

(G) Measurable objectives

Each State shall establish statewide annual measurable objectives, pursuant to subparagraph (C)(v), for meeting the requirements of this paragraph, and which –

(i) shall be set separately for the assessments of mathematics and reading or language arts under subsection (a)(3);

(ii) shall be the same for all schools and local educational agencies in the State;

(iii) shall identify a single minimum percentage of students who are required to meet or exceed the proficient level on the academic assessments that applies separately to each group of students described in subparagraph (C)(v);

(iv) shall ensure that all students will meet or exceed the State's proficient level of academic achievement on the State assessments within the State's timeline under subparagraph (F); and

(v) may be the same for more than 1 year, subject to the requirements of subparagraph (H).

(H) Intermediate goals for annual yearly progress

Each State shall establish intermediate goals for meeting the requirements, including the measurable objectives in subparagraph (G), of this paragraph and that shall –

(i) increase in equal increments over the period covered by the State's timeline under subparagraph (F);

(ii) provide for the first increase to occur in not more than 2 years; and

(iii) provide for each following increase to occur in not more than 3 years.

(I) Annual improvement for schools

Each year, for a school to make adequate yearly progress under this paragraph –

(i) each group of students described in subparagraph (C)(v) must meet or exceed the objectives set by the State under subparagraph (G), except that if any group described in subparagraph (C)(v) does not meet those objectives in any particular year, the school shall be considered to have made adequate yearly progress if the percentage of students in that group who did not meet or exceed the proficient level of academic achievement on the State assessments under paragraph (3) for that year decreased by 10 percent of that percentage from the preceding school year and that group made progress on one or more of the academic indicators described in subparagraph (C)(vi) or (vii); and

(ii) not less than 95 percent of each group of students described in subparagraph (C)(v) who are enrolled in the school are required to take the assessments, consistent with paragraph (3)(C)(xi) and with accommodations, guidelines, and alternative assessments provided in the same manner as those provided under section 612(a)(16)(A) of the Individuals with Disabilities Education Act [20 U.S.C. 1412(a)(16)(A)] and paragraph (3), on which adequate yearly progress is based (except that the 95

percent requirement described in this clause shall not apply in a case in which the number of students in a category is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student).

(J) Uniform averaging procedure

For the purpose of determining whether schools are making adequate yearly progress, the State may establish a uniform procedure for averaging data which includes one or more of the following:

(i) The State may average data from the school year for which the determination is made with data from one or two school years immediately preceding that school year.

(ii) Until the assessments described in paragraph (3) are administered in such manner and time to allow for the implementation of the uniform procedure for averaging data described in clause (i), the State may use the academic assessments that were required under paragraph (3) as that paragraph was in effect on the day preceding January 8, 2002, provided that nothing in this clause shall be construed to undermine or delay the determination of adequate yearly progress, the requirements of section 6316 of this title, or the implementation of assessments under this section.

(iii) The State may use data across grades in a school.

(K) Accountability for charter schools

The accountability provisions under this chapter shall be overseen for charter schools in accordance with State charter school law.

(3) Academic assessments

(A) In general

Each State plan shall demonstrate that the State educational agency, in consultation with local educational agencies, has implemented a set of high-quality, yearly student academic assessments that include, at a minimum, academic assessments in mathematics, reading or language arts, and science that will be used as the primary means of determining the yearly performance of the State and of each local educational agency and school in the State in enabling all children to meet the State's challenging student academic achievement standards, except that no State shall be required to meet the requirements of this part relating to science assessments until the beginning of the 2007-2008 school year.

(B) Use of assessments

Each State educational agency may incorporate the data from the assessments under this paragraph into a State-developed longitudinal data system that links student test scores, length of enrollment, and graduation records over time.

(C) Requirements

Such assessments shall –

(i) be the same academic assessments used to measure the achievement of all children;

(ii) be aligned with the State's challenging academic content and student academic achievement standards, and provide coherent information about student attainment of such standards;

(iii) be used for purposes for which such assessments are valid and reliable, and be consistent with relevant, nationally recognized professional and technical standards;

(iv) be used only if the State educational agency provides to the Secretary evidence from the test publisher or other relevant sources that the assessments used are of adequate technical quality for each purpose required under this chapter and are consistent with the requirements of this section, and such evidence is made public by the Secretary upon request;

(v)(I) except as otherwise provided for grades 3 through 8 under clause vii, measure the proficiency of students in, at a minimum, mathematics and reading or language arts, and be administered not less than once during –

(aa) grades 3 through 5;

(bb) grades 6 through 9; and

(cc) grades 10 through 12;

(II) beginning not later than school year 2007-2008, measure the proficiency of all students in science and be administered not less than one time during –

(aa) grades 3 through 5;

(bb) grades 6 through 9; and

(cc) grades 10 through 12;

(vi) involve multiple up-to-date measures of student academic achievement, including measures that assess higher-order thinking skills and understanding;

(vii) beginning not later than school year 2005-2006, measure the achievement of students against the challenging State academic content and student academic achievement standards in each of grades 3 through 8 in, at a minimum, mathematics, and reading or language arts, except that the Secretary may provide the State 1 additional year if the State demonstrates that exceptional or uncontrollable circumstances, such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State, prevented full implementation of the academic assessments by that deadline and that the State will complete implementation within the additional 1-year period;

(viii) at the discretion of the State, measure the proficiency of students in academic subjects not described in clauses (v), (vi), (vii) in which the State has adopted challenging academic content and academic achievement standards;

(ix) provide for –

(I) the participation in such assessments of all students;

(II) the reasonable adaptations and accommodations for students with disabilities (as defined under section 602(3) of the Individuals with Disabilities Education Act [20 U.S.C. 1401(3)]) necessary to measure the academic achievement of such students relative to State academic content and State student academic achievement standards; and

(III) the inclusion of limited English proficient students, who shall be assessed in a valid and reliable manner and provided reasonable accommodations on assessments administered to such students under this paragraph, including, to the extent practicable, assessments in the language and form most likely to yield accurate data on what such students know and can do in academic content areas, until

such students have achieved English language proficiency as determined under paragraph (7);

(x) notwithstanding subclause (III), the academic assessment (using tests written in English) of reading or language arts of any student who has attended school in the United States (not including Puerto Rico) for three or more consecutive school years, except that if the local educational agency determines, on a case-by-case individual basis, that academic assessments in another language or form would likely yield more accurate and reliable information on what such student knows and can do, the local educational agency may make a determination to assess such student in the appropriate language other than English for a period that does not exceed two additional consecutive years, provided that such student has not yet reached a level of English language proficiency sufficient to yield valid and reliable information on what such student knows and can do on tests (written in English) of reading or language arts;

(xi) include students who have attended schools in a local educational agency for a full academic year but have not attended a single school for

a full academic year, except that the performance of students who have attended more than 1 school in the local educational agency in any academic year shall be used only in determining the progress of the local educational agency;

(xii) produce individual student interpretive, descriptive, and diagnostic reports, consistent with clause (iii) that allow parents, teachers, and principals to understand and address the specific academic needs of students, and include information regarding achievement on academic assessments aligned with State academic achievement standards, and that are provided to parents, teachers, and principals, as soon as is practicably possible after the assessment is given, in an understandable and uniform format, and to the extent practicable, in a language that parents can understand;

(xiii) enable results to be disaggregated within each State, local educational agency, and school by gender, by each major racial and ethnic group, by English proficiency status, by migrant status, by students with disabilities as compared to nondisabled students, and by economically disadvantaged students as compared to students who

are not economically disadvantaged, except that, in the case of a local educational agency or a school, such disaggregation shall not be required in a case in which the number of students in a category is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student;

(xiv) be consistent with widely accepted professional testing standards, objectively measure academic achievement, knowledge, and skills, and be tests that do not evaluate or assess personal or family beliefs and attitudes, or publicly disclose personally identifiable information; and

(xv) enable itemized score analyses to be produced and reported, consistent with clause (iii), to local educational agencies and schools, so that parents, teachers, principals, and administrators can interpret and address the specific academic needs of students as indicated by the students' achievement on assessment items.

. . .

(6) Language assessments

Each State plan shall identify the languages other than English that are present in the participating student population and indicate the

languages for which yearly student academic assessments are not available and are needed. The State shall make every effort to develop such assessments and may request assistance from the Secretary if linguistically accessible academic assessment measures are needed. Upon request, the Secretary shall assist with the identification of appropriate academic assessment measures in the needed languages, but shall not mandate a specific academic assessment or mode of instruction.

(7) Academic assessments of English language proficiency

Each State plan shall demonstrate that local educational agencies in the State will, beginning not later than school year 2002-2003, provide for an annual assessment of English proficiency (measuring students' oral language, reading, and writing skills in English) of all students with limited English proficiency in the schools served by the State educational agency, except that the Secretary may provide the State 1 additional year if the State demonstrates that exceptional or uncontrollable circumstances, such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State, prevented full implementation of this paragraph by that deadline and that the State will complete implementation within the additional 1-year period.

(8) Requirement

Each State plan shall describe –

(A) how the State educational agency will assist each local educational agency and school affected by the State plan to develop the capacity to comply with each of the requirements of sections 6312(c)(1)(D), 6314(b), and 6315(c) of this title that is applicable to such agency or school;

(B) how the State educational agency will assist each local educational agency and school affected by the State plan to provide additional educational assistance to individual students assessed as needing help to achieve the State's challenging academic achievement standards;

(C) the specific steps the State educational agency will take to ensure that both schoolwide programs and targeted assistance schools provide instruction by highly qualified instructional staff as required by sections 6314(b)(1)(C) and 6315(c)(1)(E) of this title, including steps that the State educational agency will take to ensure that poor and minority children are not taught at higher rates than other children by inexperienced, unqualified, or out-of-field teachers, and the measures that the State educational agency will use to evaluate and publicly report the progress of the State educational agency with respect to such steps;

(D) an assurance that the State educational agency will assist local educational agencies in developing or identifying high-quality effective curricula aligned with State academic achievement standards and how the State

educational agency will disseminate such curricula to each local educational agency and school within the State; and

(E) such other factors the State educational agency determines appropriate to provide students an opportunity to achieve the knowledge and skills described in the challenging academic content standards adopted by the State.

(9) Factors affecting student achievement

Each State plan shall include an assurance that the State educational agency will coordinate and collaborate, to the extent feasible and necessary as determined by the State educational agency, with agencies providing services to children, youth, and families, with respect to local educational agencies within the State that are identified under section 6316 of this title and that request assistance with addressing major factors that have significantly affected the academic achievement of students in the local educational agency or schools served by such agency.

(10) Use of academic assessment results to improve student academic achievement

Each State plan shall describe how the State educational agency will ensure that the results of the State assessments described in paragraph (3) –

(A) will be promptly provided to local educational agencies, schools, and teachers in a manner that is clear and easy to understand, but not later than before the beginning of the next school year; and

(B) be used by those local educational agencies, schools, and teachers to improve the educational achievement of individual students.

(c) Other provisions to support teaching and learning

Each State plan shall contain assurances that –

(1) the State educational agency will meet the requirements of subsection (h)(1) and, beginning with the 2002-2003 school year, will produce the annual State report cards described in such subsection, except that the Secretary may provide the State educational agency 1 additional year if the State educational agency demonstrates that exceptional or uncontrollable circumstances, such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State, prevented full implementation of this paragraph by that deadline and that the State will complete implementation within the additional 1-year period;

(2) the State will, beginning in school year 2002-2003, participate in biennial State academic assessments of 4th and 8th grade reading and mathematics under the National Assessment of Educational Progress carried out under section 9622(b)(2) of this title if the Secretary pays the costs of administering such assessments;

(3) the State educational agency, in consultation with the Governor, will include, as a component of the State plan, a plan to carry out the responsibilities of the State under sections 6316 and 6317 of this title, including carrying out the State educational agency's statewide system of

technical assistance and support for local educational agencies;

(4) the State educational agency will work with other agencies, including educational service agencies or other local consortia, and institutions to provide technical assistance to local educational agencies and schools, including technical assistance in providing professional development under section 6319 of this title, technical assistance under section 6317 of this title, and technical assistance relating to parental involvement under section 6318 of this title;

(5)(A) where educational service agencies exist, the State educational agency will consider providing professional development and technical assistance through such agencies; and

(B) where educational service agencies do not exist, the State educational agency will consider providing professional development and technical assistance through other cooperative agreements such as through a consortium of local educational agencies;

(6) the State educational agency will notify local educational agencies and the public of the content and student academic achievement standards and academic assessments developed under this section, and of the authority to operate schoolwide programs, and will fulfill the State educational agency's responsibilities regarding local educational agency improvement and school improvement under section 6316 of this title, including such corrective actions as are necessary;

(7) the State educational agency will provide the least restrictive and burdensome regulations for local educational agencies and individual schools participating in a program assisted under this part;

(8) the State educational agency will inform the Secretary and the public of how Federal laws, if at all, hinder the ability of States to hold local educational agencies and schools accountable for student academic achievement;

(9) the State educational agency will encourage schools to consolidate funds from other Federal, State, and local sources for schoolwide reform in schoolwide programs under section 6314 of this title;

(10) the State educational agency will modify or eliminate State fiscal and accounting barriers so that schools can easily consolidate funds from other Federal, State, and local sources for schoolwide programs under section 6314 of this title;

(11) the State educational agency has involved the committee of practitioners established under section 6573(b) of this title in developing the plan and monitoring its implementation;

(12) the State educational agency will inform local educational agencies in the State of the local educational agency's authority to transfer funds under subchapter VI of this chapter, to obtain waivers under part D of subchapter IX of this chapter, and, if the State is an Ed-Flex Partnership State, to obtain waivers under the Education Flexibility Partnership Act of 1999;

(13) the State educational agency will coordinate activities funded under this part with other Federal activities as appropriate; and

(14) the State educational agency will encourage local educational agencies and individual schools participating in a program assisted under this part to offer family literacy services (using funds under this part), if the agency or school determines that a substantial number of students served under this part by the agency or school have parents who do not have a secondary school diploma or its recognized equivalent or who have low levels of literacy.

(d) Parental involvement

Each State plan shall describe how the State educational agency will support the collection and dissemination to local educational agencies and schools of effective parental involvement practices. Such practices shall –

(1) be based on the most current research that meets the highest professional and technical standards, on effective parental involvement that fosters achievement to high standards for all children; and

(2) be geared toward lowering barriers to greater participation by parents in school planning, review, and improvement experienced.

(e) Peer review and secretarial approval

(1) Secretarial duties

The Secretary shall –

(A) establish a peer-review process to assist in the review of State plans;

(B) appoint individuals to the peer-review process who are representative of parents, teachers, State educational agencies, and local educational agencies, and who are familiar with educational standards, assessments, accountability, the needs of low-performing schools, and other educational needs of students;

(C) approve a State plan within 120 days of its submission unless the Secretary determines that the plan does not meet the requirements of this section;

(D) if the Secretary determines that the State plan does not meet the requirements of subsection (a), (b), or (c) of this section, immediately notify the State of such determination and the reasons for such determination;

(E) not decline to approve a State's plan before –

(i) offering the State an opportunity to revise its plan;

(ii) providing technical assistance in order to assist the State to meet the requirements of subsections (a), (b), and (c) of this section; and

(iii) providing a hearing; and

(F) have the authority to disapprove a State plan for not meeting the requirements of this part, but shall not have the authority

to require a State, as a condition of approval of the State plan, to include in, or delete from, such plan one or more specific elements of the State's academic content standards or to use specific academic assessment instruments or items.

(2) State revisions

A State plan shall be revised by the State educational agency if it is necessary to satisfy the requirements of this section.

(f) Duration of the plan

(1) In general

Each State plan shall –

(A) remain in effect for the duration of the State's participation under this part; and

(B) be periodically reviewed and revised as necessary by the State educational agency to reflect changes in the State's strategies and programs under this part.

(2) Additional information

If significant changes are made to a State's plan, such as the adoption of new State academic content standards and State student achievement standards, new academic assessments, or a new definition of adequate yearly progress, such information shall be submitted to the Secretary.

(g) Penalties

(1) Failure to meet deadlines enacted in 1994

(A) In general

If a State fails to meet the deadlines established by the Improving America's Schools Act of 1994 (or under any waiver granted by the Secretary or under any compliance agreement with the Secretary) for demonstrating that the State has in place challenging academic content standards and student achievement standards, and a system for measuring and monitoring adequate yearly progress, the Secretary shall withhold 25 percent of the funds that would otherwise be available to the State for State administration and activities under this part in each year until the Secretary determines that the State meets those requirements.

(B) No extension

Notwithstanding any other provision of law, 90 days after January 8, 2002, the Secretary shall not grant any additional waivers of, or enter into any additional compliance agreements to extend, the deadlines described in subparagraph (A) for any State.

(2) Failure to meet requirements enacted in 2001

If a State fails to meet any of the requirements of this section, other than the requirements described in paragraph (1), then the Secretary may withhold funds for State administration under this part until the Secretary determines that the State has fulfilled those requirements.

(h) Reports

(1) Annual State report card

(A) In general

Not later than the beginning of the 2002-2003 school year, unless the State has received a 1-year extension pursuant to subsection (c)(1) of this section, a State that receives assistance under this part shall prepare and disseminate an annual State report card.

(B) Implementation

The State report card shall be –

(i) concise; and

(ii) presented in an understandable and uniform format and, to the extent practicable, provided in a language that the parents can understand.

(C) Required information

The State shall include in its annual State report card –

(i) information, in the aggregate, on student achievement at each proficiency level on the State academic assessments described in subsection (b)(3) of this section (disaggregated by race, ethnicity, gender, disability status, migrant status, English proficiency, and status as economically disadvantaged, except that such disaggregation shall not be required in a case in which the number of students in a category is insufficient to yield statistically reliable information or the results would reveal personally

identifiable information about an individual student);

(ii) information that provides a comparison between the actual achievement levels of each group of students described in subsection (b)(2)(C)(v) of this section and the State's annual measurable objectives for each such group of students on each of the academic assessments required under this part;

(iii) the percentage of students not tested (disaggregated by the same categories and subject to the same exception described in clause (i));

(iv) the most recent 2-year trend in student achievement in each subject area, and for each grade level, for which assessments under this section are required;

(v) aggregate information on any other indicators used by the State to determine the adequate yearly progress of students in achieving State academic achievement standards;

(vi) graduation rates for secondary school students consistent with subsection (b)(2)(C)(vi) of this section;

(vii) information on the performance of local educational agencies in the State regarding making adequate yearly progress, including the number and names of each school identified for school

improvement under section 6316 of this title; and

(viii) the professional qualifications of teachers in the State, the percentage of such teachers teaching with emergency or provisional credentials, and the percentage of classes in the State not taught by highly qualified teachers, in the aggregate and disaggregated by high-poverty compared to low-poverty schools which, for the purpose of this clause, means schools in the top quartile of poverty and the bottom quartile of poverty in the State.

(D) Optional information

The State may include in its annual State report card such other information as the State believes will best provide parents, students, and other members of the public with information regarding the progress of each of the State's public elementary schools and public secondary schools. Such information may include information regarding –

(i) school attendance rates;

(ii) average class size in each grade;

(iii) academic achievement and gains in English proficiency of limited English proficient students;

(iv) the incidence of school violence, drug abuse, alcohol abuse, student suspensions, and student expulsions;

(v) the extent and type of parental involvement in the schools;

(vi) the percentage of students completing advanced placement courses, and the rate of passing of advanced placement tests; and

(vii) a clear and concise description of the State's accountability system, including a description of the criteria by which the State evaluates school performance, and the criteria that the State has established, consistent with subsection (b)(2) of this section, to determine the status of schools regarding school improvement, corrective action, and restructuring.

(2) Annual local educational agency report cards

(A) Report cards

(i) In general

Not later than the beginning of the 2002-2003 school year, a local educational agency that receives assistance under this part shall prepare and disseminate an annual local educational agency report card, except that the State educational agency may provide the local educational agency 1 additional year if the local educational agency demonstrates that exceptional or uncontrollable circumstances, such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the local educational agency, prevented full

implementation of this paragraph by that deadline and that the local educational agency will complete implementation within the additional 1-year period.

(ii) Special rule

If a State educational agency has received an extension pursuant to subsection (c)(1) of this section, then a local educational agency within that State shall not be required to include the information required under paragraph (1)(C) in such report card during such extension.

(B) Minimum requirements

The State educational agency shall ensure that each local educational agency collects appropriate data and includes in the local educational agency's annual report the information described in paragraph (1)(C) as applied to the local educational agency and each school served by the local educational agency, and –

(i) in the case of a local educational agency –

(I) the number and percentage of schools identified for school improvement under section 6316(c) of this title and how long the schools have been so identified; and

(II) information that shows how students served by the local educational agency achieved on the

statewide academic assessment compared to students in the State as a whole; and

(ii) in the case of a school –

(I) whether the school has been identified for school improvement; and

(II) information that shows how the school's students achievement on the statewide academic assessments and other indicators of adequate yearly progress compared to students in the local educational agency and the State as a whole.

(C) Other information

A local educational agency may include in its annual local educational agency report card any other appropriate information, whether or not such information is included in the annual State report card.

(D) Data

A local educational agency or school shall only include in its annual local educational agency report card data that are sufficient to yield statistically reliable information, as determined by the State, and that do not reveal personally identifiable information about an individual student.

(E) Public dissemination

The local educational agency shall, not later than the beginning of the 2002-2003 school

year, unless the local educational agency has received a 1-year extension pursuant to subparagraph (A), publicly disseminate the information described in this paragraph to all schools in the school district served by the local educational agency and to all parents of students attending those schools in an understandable and uniform format and, to the extent practicable, provided in a language that the parents can understand, and make the information widely available through public means, such as posting on the Internet, distribution to the media, and distribution through public agencies, except that if a local educational agency issues a report card for all students, the local educational agency may include the information under this section as part of such report.

(3) Preexisting report cards

A State educational agency or local educational agency that was providing public report cards on the performance of students, schools, local educational agencies, or the State prior to January 8, 2002, may use those report cards for the purpose of this subsection, so long as any such report card is modified, as may be needed, to contain the information required by this subsection.

(4) Annual State report to the Secretary

Each State educational agency receiving assistance under this part shall report annually to the Secretary, and make widely available within the State –

(A) beginning with school year 2002-2003, information on the State's progress in developing and implementing the academic assessments described in subsection (b)(3) of this section;

(B) beginning not later than school year 2002-2003, information on the achievement of students on the academic assessments required by subsection (b)(3) of this section, including the disaggregated results for the categories of students identified in subsection (b)(2)(C)(v) of this section;

(C) in any year before the State begins to provide the information described in subparagraph (B), information on the results of student academic assessments (including disaggregated results) required under this section;

(D) beginning not later than school year 2002-2003, unless the State has received an extension pursuant to subsection (c)(1) of this section, information on the acquisition of English proficiency by children with limited English proficiency;

(E) the number and names of each school identified for school improvement under section 6316(c) of this title, the reason why each school was so identified, and the measures taken to address the achievement problems of such schools;

(F) the number of students and schools that participated in public school choice and

supplemental service programs and activities under this subchapter; and

(G) beginning not later than the 2002-2003 school year, information on the quality of teachers and the percentage of classes being taught by highly qualified teachers in the State, local educational agency, and school.

. . .

(6) Parents right-to-know

(A) Qualifications

At the beginning of each school year, a local educational agency that receives funds under this part shall notify the parents of each student attending any school receiving funds under this part that the parents may request, and the agency will provide the parents on request (and in a timely manner), information regarding the professional qualifications of the student's classroom teachers, including, at a minimum, the following:

(i) Whether the teacher has met State qualification and licensing criteria for the grade levels and subject areas in which the teacher provides instruction.

(ii) Whether the teacher is teaching under emergency or other provisional status through which State qualification or licensing criteria have been waived.

(iii) The baccalaureate degree major of the teacher and any other graduate certification or degree held by the teacher,

and the field of discipline of the certification or degree.

(iv) Whether the child is provided services by paraprofessionals and, if so, their qualifications.

(B) Additional information

In addition to the information that parents may request under subparagraph (A), a school that receives funds under this part shall provide to each individual parent –

(i) information on the level of achievement of the parent's child in each of the State academic assessments as required under this part; and

(ii) timely notice that the parent's child has been assigned, or has been taught for four or more consecutive weeks by, a teacher who is not highly qualified.

(C) Format

The notice and information provided to parents under this paragraph shall be in an understandable and uniform format and, to the extent practicable, provided in a language that the parents can understand.

(i) Privacy

Information collected under this section shall be collected and disseminated in a manner that protects the privacy of individuals.

(j) Technical assistance

The Secretary shall provide a State educational agency, at the State educational agency's request, technical assistance in meeting the requirements of this section, including the provision of advice by experts in the development of high- quality academic assessments, the setting of State standards, the development of measures of adequate yearly progress that are valid and reliable, and other relevant areas.

(k) Voluntary partnerships

A State may enter into a voluntary partnership with another State to develop and implement the academic assessments and standards required under this section.

(l) Construction

Nothing in this part shall be construed to prescribe the use of the academic assessments described in this part for student promotion or graduation purposes.

(m) Special rule with respect to Bureau-funded schools

In determining the assessments to be used by each operated or funded by BIA school receiving funds under this part, the following shall apply:

(1) Each such school that is accredited by the State in which it is operating shall use the assessments the State has developed and implemented to meet the requirements of this section, or such other appropriate assessment as approved by the Secretary of the Interior.

(2) Each such school that is accredited by a regional accrediting organization shall adopt an appropriate assessment, in consultation with and with the approval of, the Secretary of the Interior and consistent with assessments adopted by other schools in the same State or region, that meets the requirements of this section.

(3) Each such school that is accredited by a tribal accrediting agency or tribal division of education shall use an assessment developed by such agency or division, except that the Secretary of the Interior shall ensure that such assessment meets the requirements of this section.

---

20 U.S.C. § 6801

§ 6801. Authorizations of appropriations; condition on effectiveness of parts

(a) Authorizations of appropriations

(1) In general

Subject to subsection (b) of this section, there are authorized to be appropriated to carry out this subchapter, except for subpart 4 of part B, $750,000,000 for fiscal year 2002 and such sums as may be necessary for each of the 5 succeeding fiscal years.

(2) Emergency immigrant education program

There are authorized to be appropriated to carry out subpart 4 of part B of this subchapter (when such part is in effect) such sums as may be necessary for fiscal year 2002 and each of the 5 succeeding fiscal years.

(b) Conditions on effectiveness of Parts A and B

(1) Part A

Part A of this subchapter shall be in effect for any fiscal year for which the amount appropriated under paragraphs (1) and (2) of subsection (a) of this section equals or exceeds $650,000,000.

(2) Part B

Part B of this subchapter shall be in effect only for a fiscal year for which part A of this subchapter is not in effect.

(c) References

In any fiscal year for which part A of this subchapter is in effect, references in Federal law (other than this subchapter) to part B of this subchapter shall be considered to be references to part A of this subchapter. In any fiscal year for which part B of this subchapter is in effect, references in Federal law (other than this subchapter) to part A of this subchapter shall be considered to be references to part B of this subchapter.

---

20 U.S.C. § 6812(1)

§ 6812. Purposes

The purposes of this part are –

(1) to help ensure that children who are limited English proficient, including immigrant children and youth, attain English proficiency, develop high levels of academic

attainment in English, and meet the same challenging State academic content and student academic achievement standards as all children are expected to meet;

. . .

(8) to hold State educational agencies, local educational agencies, and schools accountable for increases in English proficiency and core academic content knowledge of limited English proficient children by requiring –

(A) demonstrated improvements in the English proficiency of limited English proficient children each fiscal year; and

(B) adequate yearly progress for limited English proficient children, including immigrant children and youth, as described in section 6311(b)(2)(B) of this title; and

(9) to provide State educational agencies and local educational agencies with the flexibility to implement language instruction educational programs, based on scientifically based research on teaching limited English proficient children, that the agencies believe to be the most effective for teaching English.

20 U.S.C. § 6823

§ 6823. State and specially qualified agency plans

(a) Plan required

Each State educational agency and specially qualified agency desiring a grant under this subpart shall submit a plan to the Secretary at such time, in such manner, and containing such information as the Secretary may require.

(b) Contents

Each plan submitted under subsection (a) of this section shall –

(1) describe the process that the agency will use in making subgrants to eligible entities under section 6824(d)(1) of this title;

(2) describe how the agency will establish standards and objectives for raising the level of English proficiency that are derived from the four recognized domains of speaking, listening, reading, and writing, and that are aligned with achievement of the challenging State academic content and student academic achievement standards described in section 6311(b)(1) of this title;

(3) contain an assurance that –

(A) in the case of a State educational agency, the agency consulted with local educational agencies, education-related community groups and nonprofit organizations, parents, teachers, school administrators, and researchers, in

developing the annual measurable achievement objectives described in section 6842 of this title;

(B) in the case of a specially qualified agency, the agency consulted with education-related community groups and nonprofit organizations, parents, teachers, and researchers, in developing the annual measurable achievement objectives described in section 6842 of this title;

(C) the agency will ensure that eligible entities receiving a subgrant under this subpart comply with the requirement in section 6311(b)(7) of this title to annually assess in English children who have been in the United States for 3 or more consecutive years;

(D) the agency will ensure that eligible entities receiving a subgrant under this subpart annually assess the English proficiency of all limited English proficient children participating in a program funded under this subpart, consistent with section 6311(b)(7) of this title;

(E) in awarding subgrants under section 6824 of this title, the agency will address the needs of school systems of all sizes and in all geographic areas, including school systems with rural and urban schools;

(F) subgrants to eligible entities under section 6824(d)(1) of this title will be of sufficient size and scope to allow such entities to carry out high-quality language instruction

educational programs for limited English proficient children; and

(G) the agency will require an eligible entity receiving a subgrant under this subpart to use the subgrant in ways that will build such recipient's capacity to continue to offer high-quality language instruction educational programs that assist limited English proficient children in meeting challenging State academic content and student academic achievement standards once assistance under this subpart is no longer available;

(4) describe how the agency will coordinate its programs and activities under this subpart with its other programs and activities under this chapter and other Acts, as appropriate;

(5) describe how the agency will hold local educational agencies, eligible entities, elementary schools, and secondary schools accountable for –

(A) meeting all annual measurable achievement objectives described in section 6842 of this title;

(B) making adequate yearly progress for limited English proficient children, as described in section 6311(b)(2)(B) of this title; and

(C) achieving the purposes of this part; and

(6) describe how eligible entities in the State will be given the flexibility to teach limited English proficient children –

(A) using a language instruction curriculum that is tied to scientifically based research on teaching limited English proficient children and that has been demonstrated to be effective; and

(B) in the manner the eligible entities determine to be the most effective.

(c) Approval

The Secretary, after using a peer review process, shall approve a plan submitted under subsection (a) of this section if the plan meets the requirements of this section.

(d) Duration of plan

(1) In general

Each plan submitted by a State educational agency or specially qualified agency and approved under subsection (c) of this section shall –

(A) remain in effect for the duration of the agency's participation under this part; and

(B) be periodically reviewed and revised by the agency, as necessary, to reflect changes to the agency's strategies and programs carried out under this part.

(2) Additional information

(A) Amendments

If the State educational agency or specially qualified agency amends the plan, the agency shall submit such amendment to the Secretary.

(B) Approval

The Secretary shall approve such amendment to an approved plan, unless the Secretary determines that the amendment will result in the agency not meeting the requirements, or fulfilling the purposes, of this part.

(e) Consolidated plan

A plan submitted under subsection (a) of this section may be submitted as part of a consolidated plan under section 7842 of this title.

(f) Secretary assistance

The Secretary shall provide technical assistance, if requested, in the development of English proficiency standards, objectives, and assessments.

---

20 U.S.C. § 6825

§ 6825. Subgrants to eligible entities

(a) Purposes of subgrants

A State educational agency may make a subgrant to an eligible entity from funds received by the agency under this subpart only if the entity agrees to expend the funds to improve the education of limited English proficient children, by assisting the children to learn English and meet challenging State academic content and student academic achievement standards. In carrying out activities with such funds, the entity shall use approaches and methodologies based on scientifically based research on teaching limited

English proficient children and immigrant children and youth for the following purposes:

(1) Developing and implementing new language instruction educational programs and academic content instruction programs for such children, and such children and youth, including programs of early childhood education, elementary school programs, and secondary school programs.

(2) Carrying out highly focused, innovative, locally designed activities to expand or enhance existing language instruction educational programs and academic content instruction programs for such children, and such children and youth.

(3) Implementing, within an individual school, schoolwide programs for restructuring, reforming, and upgrading all relevant programs, activities, and operations relating to language instruction educational programs and academic content instruction for such children, and such children and youth.

(4) Implementing, within the entire jurisdiction of a local educational agency, agencywide programs for restructuring, reforming, and upgrading all relevant programs, activities, and operations relating to language instruction educational programs and academic content instruction for such children, and such children and youth.

(b) Administrative expenses

Each eligible entity receiving funds under section 6824(a) of this title for a fiscal year may use not more

than 2 percent of such funds for the cost of administering this subpart.

(c) Required subgrantee activities

An eligible entity receiving funds under section 6824(a) of this title shall use the funds –

(1) to increase the English proficiency of limited English proficient children by providing high-quality language instruction educational programs that are based on scientifically based research demonstrating the effectiveness of the programs in increasing –

(A) English proficiency; and

(B) student academic achievement in the core academic subjects; and

(2) to provide high-quality professional development to classroom teachers (including teachers in classroom settings that are not the settings of language instruction educational programs), principals, administrators, and other school or community-based organizational personnel, that is –

(A) designed to improve the instruction and assessment of limited English proficient children;

(B) designed to enhance the ability of such teachers to understand and use curricula, assessment measures, and instruction strategies for limited English proficient children;

(C) based on scientifically based research demonstrating the effectiveness of the professional development in increasing children's

English proficiency or substantially increasing the subject matter knowledge, teaching knowledge, and teaching skills of such teachers; and

(D) of sufficient intensity and duration (which shall not include activities such as one-day or short-term workshops and conferences) to have a positive and lasting impact on the teachers' performance in the classroom, except that this subparagraph shall not apply to an activity that is one component of a long-term, comprehensive professional development plan established by a teacher and the teacher's supervisor based on an assessment of the needs of the teacher, the supervisor, the students of the teacher, and any local educational agency employing the teacher.

(d) Authorized subgrantee activities

Subject to subsection (c) of this section, an eligible entity receiving funds under section 6824(a) of this title may use the funds to achieve one of the purposes described in subsection (a) of this section by undertaking one or more of the following activities:

(1) Upgrading program objectives and effective instruction strategies.

(2) Improving the instruction program for limited English proficient children by identifying, acquiring, and upgrading curricula, instruction materials, educational software, and assessment procedures.

(3) Providing –

(A) tutorials and academic or vocational education for limited English proficient children; and

(B) intensified instruction.

(4) Developing and implementing elementary school or secondary school language instruction educational programs that are coordinated with other relevant programs and services.

(5) Improving the English proficiency and academic achievement of limited English proficient children.

(6) Providing community participation programs, family literacy services, and parent outreach and training activities to limited English proficient children and their families –

(A) to improve the English language skills of limited English proficient children; and

(B) to assist parents in helping their children to improve their academic achievement and becoming active participants in the education of their children.

(7) Improving the instruction of limited English proficient children by providing for –

(A) the acquisition or development of educational technology or instructional materials;

(B) access to, and participation in, electronic networks for materials, training, and communication; and

(C) incorporation of the resources described in subparagraphs (A) and (B) into curricula and programs, such as those funded under this subpart.

(8) Carrying out other activities that are consistent with the purposes of this section.

(e) Activities by agencies experiencing substantial increases in immigrant children and youth

(1) In general

An eligible entity receiving funds under section 6824(d)(1) of this title shall use the funds to pay for activities that provide enhanced instructional opportunities for immigrant children and youth, which may include –

(A) family literacy, parent outreach, and training activities designed to assist parents to become active participants in the education of their children;

(B) support for personnel, including teacher aides who have been specifically trained, or are being trained, to provide services to immigrant children and youth;

(C) provision of tutorials, mentoring, and academic or career counseling for immigrant children and youth;

(D) identification and acquisition of curricular materials, educational software, and technologies to be used in the program carried out with funds;

(E) basic instruction services that are directly attributable to the presence in the school district involved of immigrant children and youth, including the payment of costs of providing additional classroom supplies, costs of transportation, or such other costs as are directly attributable to such additional basic instruction services;

(F) other instruction services that are designed to assist immigrant children and youth to achieve in elementary schools and secondary schools in the United States, such as programs of introduction to the educational system and civics education; and

(G) activities, coordinated with community-based organizations, institutions of higher education, private sector entities, or other entities with expertise in working with immigrants, to assist parents of immigrant children and youth by offering comprehensive community services.

(2) Duration of subgrants

The duration of a subgrant made by a State educational agency under section 6824(d)(1) of this title shall be determined by the agency in its discretion.

(f) Selection of method of instruction

(1) In general

To receive a subgrant from a State educational agency under this subpart, an eligible entity shall select one or more methods or forms of instruction

to be used in the programs and activities undertaken by the entity to assist limited English proficient children to attain English proficiency and meet challenging State academic content and student academic achievement standards.

(2) Consistency

Such selection shall be consistent with sections 6845 through 6847 of this title.

(g) Supplement, not supplant

Federal funds made available under this subpart shall be used so as to supplement the level of Federal, State, and local public funds that, in the absence of such availability, would have been expended for programs for limited English proficient children and immigrant children and youth and in no case to supplant such Federal, State, and local public funds.

---

20 U.S.C. § 6826

§ 6826. Local plans

(a) Plan required

Each eligible entity desiring a subgrant from the State educational agency under section 6824 of this title shall submit a plan to the State educational agency at such time, in such manner, and containing such information as the State educational agency may require.

(b) Contents

Each plan submitted under subsection (a) of this section shall –

(1) describe the programs and activities proposed to be developed, implemented, and administered under the subgrant;

(2) describe how the eligible entity will use the subgrant funds to meet all annual measurable achievement objectives described in section 6842 of this title;

(3) describe how the eligible entity will hold elementary schools and secondary schools receiving funds under this subpart accountable for –

(A) meeting the annual measurable achievement objectives described in section 6842 of this title;

(B) making adequate yearly progress for limited English proficient children, as described in section 6311(b)(2)(B) of this title; and

(C) annually measuring the English proficiency of limited English proficient children, so that such children served by the programs carried out under this part develop proficiency in English while meeting State academic content and student academic achievement standards as required by section 6311(b)(1) of this title;

(4) describe how the eligible entity will promote parental and community participation in programs for limited English proficient children;

(5) contain an assurance that the eligible entity consulted with teachers, researchers, school administrators, and parents, and, if appropriate, with education-related community groups and nonprofit organizations, and institutions of higher education, in developing such plan; and

(6) describe how language instruction educational programs carried out under the subgrant will ensure that limited English proficient children being served by the programs develop English proficiency.

(c) Teacher English fluency

Each eligible entity receiving a subgrant under section 6824 of this title shall include in its plan a certification that all teachers in any language instruction educational program for limited English proficient children that is, or will be, funded under this part are fluent in English and any other language used for instruction, including having written and oral communications skills.

(d) Other requirements for approval

Each local plan shall also contain assurances that –

(1) each local educational agency that is included in the eligible entity is complying with

section 7012 of this title prior to, and throughout, each school year;

(2) the eligible entity annually will assess the English proficiency of all children with limited English proficiency participating in programs funded under this part;

(3) the eligible entity has based its proposed plan on scientifically based research on teaching limited English proficient children;

(4) the eligible entity will ensure that the programs will enable children to speak, read, write, and comprehend the English language and meet challenging State academic content and student academic achievement standards; and

(5) the eligible entity is not in violation of any State law, including State constitutional law, regarding the education of limited English proficient children, consistent with sections 6846 and 6847 of this title.

---

20 U.S.C. § 6841

§ 6841. Evaluations

(a) In general

Each eligible entity that receives a subgrant from a State educational agency under subpart 1 of this part shall provide such agency, at the conclusion of every second fiscal year during which the subgrant is received, with an evaluation, in a form prescribed by the agency, that includes –

(1) a description of the programs and activities conducted by the entity with funds received under subpart 1 of this part during the two immediately preceding fiscal years;

(2) a description of the progress made by children in learning the English language and meeting challenging State academic content and student academic achievement standards;

(3) the number and percentage of children in the programs and activities attaining English proficiency by the end of each school year, as determined by a valid and reliable assessment of English proficiency; and

(4) a description of the progress made by children in meeting challenging State academic content and student academic achievement standards for each of the 2 years after such children are no longer receiving services under this part.

(b) Use of evaluation

An evaluation provided by an eligible entity under subsection (a) of this section shall be used by the entity and the State educational agency –

(1) for improvement of programs and activities;

(2) to determine the effectiveness of programs and activities in assisting children who are limited English proficient to attain English proficiency (as measured consistent with subsection (d)) of this section and meet challenging State academic content and student academic achievement standards; and

(3) in determining whether or not to continue funding for specific programs or activities.

(c) Evaluation components

An evaluation provided by an eligible entity under subsection (a) of this section shall –

(1) provide an evaluation of children enrolled in a program or activity conducted by the entity using funds under subpart 1 of this part (including the percentage of children) who –

(A) are making progress in attaining English proficiency, including the percentage of children who have achieved English proficiency;

(B) have transitioned into classrooms not tailored to limited English proficient children, and have a sufficient level of English proficiency to permit them to achieve in English and transition into classrooms not tailored to limited English proficient children;

(C) are meeting the same challenging State academic content and student academic achievement standards as all children are expected to meet; and

(D) are not receiving waivers for the reading or language arts assessments under section 6311(b)(3)(C) of this title; and

(2) include such other information as the State educational agency may require.

(d) Evaluation measures

A State shall approve evaluation measures for use under subsection (c) of this section that are designed to assess –

(1) the progress of children in attaining English proficiency, including a child's level of comprehension, speaking, listening, reading, and writing skills in English;

(2) student attainment of challenging State student academic achievement standards on assessments described in section 6311(b)(3) of this title; and

(3) progress in meeting the annual measurable achievement objectives described in section 6842 of this title.

(e) Special rule for specially qualified agencies

Each specially qualified agency receiving a grant under this part shall provide the evaluations described in subsection (a) of this section to the Secretary subject to the same requirements as apply to eligible entities providing such evaluations to State educational agencies under such subsection.

20 U.S.C. § 6842

§ 6842. Achievement objectives and accountability

(a) Achievement objectives

(1) In general

Each State educational agency or specially qualified agency receiving a grant under subpart 1 of this part shall develop annual measurable achievement objectives for limited English proficient children served under this part that relate to such children's development and attainment of English proficiency while meeting challenging State academic content and student academic achievement standards as required by section 6311(b)(1) of this title.

(2) Development of objectives

Such annual measurable achievement objectives shall be developed in a manner that –

(A) reflects the amount of time an individual child has been enrolled in a language instruction educational program; and

(B) uses consistent methods and measurements to reflect the increases described in subparagraphs (A)(i), (A)(ii), and (B) of paragraph (3).

(3) Contents

Such annual measurable achievement objectives –

(A) shall include –

(i) at a minimum, annual increases in the number or percentage of children making progress in learning English;

(ii) at a minimum, annual increases in the number or percentage of children attaining English proficiency by the end of each school year, as determined by a valid and reliable assessment of English proficiency consistent with section 6311(b)(7) of this title; and

(iii) making adequate yearly progress for limited English proficient children as described in section 6311(b)(2)(B) of this title; and

(B) at the discretion of the agency, may include the number or percentage of children not receiving waivers for reading or language arts assessments under section 6311(b)(3)(C) of this title, but this achievement objective shall not be applied to an eligible entity that, in a given school year –

(i) has experienced a large increase in limited English proficient children or immigrant children and youth;

(ii) enrolls a statistically significant number of immigrant children and youth from countries where such children and youth had little or no access to formal education; or

(iii) has a statistically significant number of immigrant children and youth who have fled from war or natural disaster.

(b) Accountability

(1) For States

Each State educational agency receiving a grant under subpart 1 of this part shall hold eligible entities receiving a subgrant under such subpart accountable for meeting the annual measurable achievement objectives under subsection (a) of this section, including making adequate yearly progress for limited English proficient children.

(2) Improvement plan

If a State educational agency determines, based on the annual measurable achievement objectives described in subsection (a) of this section, that an eligible entity has failed to make progress toward meeting such objectives for 2 consecutive years, the agency shall require the entity to develop an improvement plan that will ensure that the entity meets such objectives. The improvement plan shall specifically address the factors that prevented the entity from achieving such objectives.

(3) Technical assistance

During the development of the improvement plan described in paragraph (2), and throughout its implementation, the State educational agency shall –

(A) provide technical assistance to the eligible entity;

(B) provide technical assistance, if applicable, to schools served by such entity under subpart 1 of this part that need assistance to enable the schools to meet the annual measurable achievement objectives described in subsection (a) of this section;

(C) develop, in consultation with the entity, professional development strategies and activities, based on scientifically based research, that the agency will use to meet such objectives;

(D) require such entity to utilize such strategies and activities; and

(E) develop, in consultation with the entity, a plan to incorporate strategies and methodologies, based on scientifically based research, to improve the specific program or method of instruction provided to limited English proficient children.

(4) Accountability

If a State educational agency determines that an eligible entity has failed to meet the annual measurable achievement objectives described in subsection (a) of this section for 4 consecutive years, the agency shall –

(A) require such entity to modify the entity's curriculum, program, and method of instruction; or

(B)(i) make a determination whether the entity shall continue to receive funds related to the entity's failure to meet such objectives; and

(ii) require such entity to replace educational personnel relevant to the entity's failure to meet such objectives.

(c) Special rule for specially qualified agencies

The Secretary shall hold specially qualified agencies receiving a grant under this subpart accountable for meeting the annual measurable achievement objectives described in subsection (a) of this section in the same manner as State educational agencies hold eligible entities accountable under subsection (b) of this section.

CODE OF FEDERAL REGULATIONS

34 C.F.R. § 80.43

§ 80.43 Enforcement.

(a) Remedies for noncompliance. If a grantee or subgrantee materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, the awarding agency may take one or more of the following actions, as appropriate in the circumstances:

(1) Temporarily withhold cash payments pending correction of the deficiency by the grantee or

subgrantee or more severe enforcement action by the awarding agency,

(2) Disallow (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance,

(3) Wholly or partly suspend or terminate the current award for the grantee's or subgrantee's program,

(4) Withhold further awards for the program, or

(5) Take other remedies that may be legally available.

(b) Hearings, appeals. In taking an enforcement action, the awarding agency will provide the grantee or subgrantee an opportunity for such hearing, appeal, or other administrative proceeding to which the grantee or subgrantee is entitled under any statute or regulation applicable to the action involved.

(c) Effects of suspension and termination. Costs of grantee or subgrantee resulting from obligations incurred by the grantee or subgrantee during a suspension or after termination of an award are not allowable unless the awarding agency expressly authorizes them in the notice of suspension or termination or subsequently. Other grantee or subgrantee costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if:

(1) The costs result from obligations which were properly incurred by the grantee or subgrantee

before the effective date of suspension or termination, are not in anticipation of it, and, in the case of a termination, are noncancellable, and,

(2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) Relationship to debarment and suspension. The enforcement remedies identified in this section, including suspension and termination, do not preclude grantee or subgrantee from being subject to "Debarment and Suspension" under E.O. 12549 (see § 80.35).

ARIZONA REVISED STATUTES

Ariz. Rev. Stat. § 15-241

§ 15-241. School accountability; schools failing to meet academic standards; failing schools tutoring fund; classification label for school districts and charter school operators

A. The department of education shall compile an annual achievement profile for each public school.

B. Each school shall submit to the department any data that is required and requested and that is necessary to compile the achievement profile. A school that fails to submit the information that is necessary is not eligible to receive monies from the classroom site fund established by § 15-977.

C. The department shall establish a baseline achievement profile for each school by October 15, 2001. The baseline achievement profile shall be used to determine a standard measurement of acceptable academic progress for each school and a school classification pursuant to subsection H of this section. Any disclosure of educational records compiled by the department of education pursuant to this section shall comply with the family educational and privacy rights act of 1974 (20 United States Code § 1232g).

D. The achievement profile for schools that offer instruction in kindergarten programs and grades one through eight, or any combination of those programs or grades, shall include the following school academic performance indicators:

1. The Arizona measure of academic progress. The department shall compute the extent of academic progress made by the pupils in each school during the course of each year.

2. The Arizona instrument to measure standards test. The department shall compute the percentage of pupils who meet or exceed the standard on the Arizona instrument to measure standards test, as prescribed by the state board of education. The superintendent of public instruction and the department may calculate academic gain on the Arizona instrument to measure standards test according to each of the school classifications prescribed in subsection G of this section on a statewide basis, for each school district in this state and for each school by determining the average scale scores for students in

the current academic year as compared to the average scale scores for the previous academic year for the same students.

3. The results of English language learners tests administered pursuant to § 15-756, subsection B, § 15-756.05 and § 15-756.06.

E. The achievement profile for schools that offer instruction in grades nine through twelve, or any combination of those grades, shall include the following school academic performance indicators:

1. The Arizona instrument to measure standards test. The department shall compute the percentage of pupils pursuant to subsection G of this section who meet or exceed the standard on the Arizona instrument to measure standards test, as prescribed by the state board of education. The superintendent of public instruction and the department may calculate academic gain on the Arizona instrument to measure standards test according to each of the school classifications prescribed in subsection G of this section on a statewide basis, for each school district in this state and for each school by determining the average scale scores for students in the current academic year as compared to the average scale scores for the previous academic year for the same students.

2. The annual dropout rate.

3. The annual graduation rate.

4. The results of English language learners tests administered pursuant to § 15-756, subsection B, § 15-756.05 and § 15-756.06.

F. Schools that offer instruction in all or a combination of the grades specified in subsections D and E of this section shall include a single achievement profile for that school that includes the school academic performance indicators specified in subsections D and E of this section.

G. Subject to final adoption by the state board of education, the department shall determine the criteria for each school classification using a research based methodology. The methodology shall include the performance of pupils at all achievement levels, account for pupil mobility, account for the distribution of pupil achievement at each school and include longitudinal indicators of academic performance. For the purposes of this subsection, "research based methodology" means the systematic and objective application of statistical and quantitative research principles to determine a standard measurement of acceptable academic progress for each school.

H. The achievement profile shall be used to determine a school classification that designates each school as one of the following:

1. An excelling school.
2. A highly performing school.
3. A performing school.

4. An underperforming school.

5. A school failing to meet academic standards.

I. The classification for each school and the criteria used to determine classification pursuant to subsection G of this section shall be included on the school report card prescribed in § 15-746.

J. Subject to final adoption by the state board of education, the department of education shall develop a parallel achievement profile for accommodation schools, alternative schools as defined by the state board of education and extremely small schools as defined by the state board of education for the purposes of this section.

K. If a school is designated as an underperforming school, within ninety days after receiving notice of the designation, the governing board shall develop an improvement plan for the school, submit a copy of the plan to the superintendent of public instruction and supervise the implementation of the plan. The plan shall include necessary components as identified by the state board of education. Within thirty days after submitting the improvement plan to the superintendent of public instruction, the governing board shall hold a special public meeting in each school that has been designated as an underperforming school and shall present the respective improvement plans that have been developed for each school. The school district governing board, within thirty days of receiving notice of the designation, shall provide written notification of the classification to each residence

within the attendance area of the school. The notice shall explain the improvement plan process and provide information regarding the public meeting required by this subsection.

L. A school that has not submitted an improvement plan pursuant to subsection K of this section is not eligible to receive monies from the classroom site fund established by § 15-977 for every day that a plan has not been received by the superintendent of public instruction within the time specified in subsection K of this section plus an additional ninety days. The state board of education shall require the superintendent of the school district to testify before the board and explain the reasons that an improvement plan for that school has not been submitted.

M. If a charter school is designated as an underperforming school, within thirty days the school shall notify the parents of the students attending the school of the classification. The notice shall explain the improvement plan process and provide information regarding the public meeting required by this subsection. Within ninety days of receiving the classification, the charter holder shall present an improvement plan to the charter sponsor at a public meeting and submit a copy of the plan to the superintendent of public instruction. The improvement plan shall include necessary components as identified by the state board of education. For every day that an improvement plan is not received by the superintendent of public instruction, the school is not eligible to receive monies from the classroom site fund established

by § 15-977 for every day that a plan has not been received by the superintendent of public instruction within the time specified in subsection K of this section plus an additional ninety days. The charter holder shall appear before the sponsoring board and explain why the improvement plan has not been submitted.

N. The department of education shall establish an appeals process, to be approved by the state board of education, for a school to appeal data used to determine the achievement profile of the school. The criteria established shall be based on mitigating factors and may include a visit to the school site by the department of education.

O. If a school remains classified as an underperforming school for a third consecutive year, the department of education shall visit the school site to confirm the classification data and to review the implementation of the school's improvement plan. The school shall be classified as failing to meet academic standards unless an alternate classification is made after an appeal pursuant to subsection N of this section.

P. The school district governing board, within thirty days of receiving notice of the school failing to meet academic standards classification, shall provide written notification of the classification to each residence in the attendance area of the school. The notice shall explain the improvement plan process

and provide information regarding the public meeting required by subsection S of this section.

Q. The superintendent of public instruction, based on need, shall assign a solutions team to an underperforming school, a school failing to meet academic standards or any other school pursuant to a mutual agreement between the department of education and the school comprised of master teachers, fiscal analysts and curriculum assessment experts who are certified by the state board of education as Arizona academic standards technicians. The department of education may hire or contract with administrators, principals and teachers who have demonstrated experience with the characteristics and situations in an underperforming school or a school failing to meet academic standards and may use these personnel as part of the solutions team. The department of education shall work with staff at the school to assist in curricula alignment and shall instruct teachers on how to increase pupil academic progress, considering the school's achievement profile. The solutions team shall consider the existing improvement plan to assess the need for changes to curriculum, professional development and resource allocation and shall present a statement of its findings to the school administrator and district superintendent. Within forty-five days after the presentation of the solutions team's statement of findings, the school district governing board, in cooperation with each school within the school district that is designated an underperforming school and its assigned solutions team

representative, shall develop and submit to the department of education an action plan that details the manner in which the school district will assist the school as the school incorporates the findings of the solutions team into the improvement plan. The department of education shall review the action plan and shall either accept the action plan or return the action plan to the school district for modification. If the school district does not submit an approved action plan within forty-five days, the state board of education may direct the superintendent of public instruction to withhold up to ten per cent of state monies that the school district would otherwise be entitled to receive each month until the plan is submitted to the department of education, at which time those monies shall be returned to the school district.

R. The parent or the guardian of the pupil may apply to the department of education, in a manner determined by the department of education, for a certificate of supplemental instruction from the failing schools tutoring fund established by this section. Pupils attending a school designated as an underperforming school or a school failing to meet academic standards or a pupil who has failed to pass one or more portions of the Arizona instrument to measure standards test in grades eight through twelve in order to graduate from high school may select an alternative tutoring program in academic standards from a provider that is certified by the state board of education. To qualify, the provider must state in writing a level of academic improvement for

the pupil that includes a timeline for improvement that is agreed to by the parent or guardian of the pupil. The state board of education shall annually review academic performance levels for providers certified pursuant to this subsection and may remove a provider at a public hearing from an approved list of providers if that provider fails to meet its stated level of academic improvement. The state board of education shall determine the application guidelines and the maximum value for each certificate of supplemental instruction. The state board of education shall annually complete a market survey in order to determine the maximum value for each certificate of supplemental instruction. Nothing in this subsection shall be construed to require the state to provide additional monies beyond the monies provided pursuant to § 42-5029, subsection E, paragraph 7.

S. Within sixty days of receiving notification of designation as a school failing to meet academic standards, the school district governing board shall evaluate needed changes to the existing improvement plan for the school, consider recommendations from the solutions team, submit a copy of the plan to the superintendent of public instruction and supervise the implementation of the plan. Within thirty days after submitting the improvement plan to the superintendent of public instruction, the governing board shall hold a public meeting in each school that has been designated as a school failing to meet academic standards and shall present the respective improvement plans that have been developed for each school.

T. A school that has not submitted an improvement plan pursuant to subsection S of this section is not eligible to receive monies from the classroom site fund established by § 15-977 for every day that a plan has not been received by the superintendent of public instruction within the time specified in subsection S of this section plus an additional ninety days. The state board of education shall require the superintendent of the school district to testify before the board and explain the reasons that an improvement plan for that school has not been submitted.

U. If a charter school is designated as a school failing to meet academic standards, the department of education shall immediately notify the charter school's sponsor. The charter school's sponsor shall either take action to restore the charter school to acceptable performance or revoke the charter school's charter. Within thirty days the school shall notify the parents of the students attending the school of the classification and of any pending public meetings to review the issue.

V. A school that has been designated as a school failing to meet academic standards shall be evaluated by the department of education to determine if the school failed to properly implement its school improvement plan, align the curriculum with academic standards, provide teacher training, prioritize the budget or implement other proven strategies to improve academic performance. After visiting the school site pursuant to subsection O of this section, the department of education shall submit to the state

board of education a recommendation to proceed pursuant to subsections Q, R and S of this section or that the school be subject to a public hearing to determine if the school failed to properly implement its improvement plan and the reasons for the department's recommendation.

W. If the department does recommend a public hearing, the state board of education shall meet and may provide by a majority vote at the public hearing for the continued operation of the school as allowed by this subsection. The state board of education shall determine whether governmental, nonprofit and private organizations may submit applications to the state board to fully or partially manage the school. The state board's determination shall include:

1. If and to what extent the local governing board may participate in the operation of the school including personnel matters.

2. If and to what extent the state board of education shall participate in the operation of the school.

3. Resource allocation pursuant to subsection Y of this section.

4. Provisions for the development and submittal of a school improvement plan to be presented in a public meeting at the school.

5. A suggested time frame for the alternative operation of the school.

X. The state board shall periodically review the status of a school that is operated by an organization other than the school district governing board to determine whether the operation of the school should be returned to the school district governing board. Before the state board makes a determination, the state board or its designee shall meet with the school district governing board or its designee to determine the time frame, operational considerations and the appropriate continuation of existing improvements that are necessary to assure a smooth transition of authority from the other organization back to the school district governing board.

Y. If an alternative operation plan is provided pursuant to subsection W of this section, the state board of education shall pay for the operation of the school and shall adjust the school district's student count pursuant to § 15-902, soft capital allocation pursuant to § 15-962, capital outlay revenue limit pursuant to § 15-961, base support level pursuant to § 15-943, monies distributed from the classroom site fund established by § 15-977 and transportation support level pursuant to § 15-945 to accurately reflect any reduction in district services that are no longer provided to that school by the district. The state board of education may modify the school district's revenue control limit, the district support level and the general budget limit calculated pursuant to § 15-947 by an amount that corresponds to this reduction in services. The state board of education shall retain the portion of state aid that would otherwise be

due the school district for the school and shall distribute that portion of state aid directly to the organization that contracts with the state board of education to operate the school.

Z. If the state board of education determines that a charter school failed to properly implement its improvement plan, the sponsor of the charter school shall revoke the charter school's charter.

AA. If there are more than two schools in a district and more than one-half, or in any case more than five, of the schools in the district are designated as schools failing to meet academic standards for more than two consecutive years, in the next election of members of the governing board the election ballot shall contain the following statement immediately above the listing of governing board candidates:

> Within the last five years, (number of schools) schools in the _____ school district have been designated as "schools failing to meet academic standards" by the superintendent of public instruction.

BB. At least twice each year the department of education shall publish in a newspaper of general circulation in each county of this state a list of schools that are designated as schools failing to meet academic standards.

CC. The failing schools tutoring fund is established consisting of monies collected pursuant to § 42-5029, subsection E as designated for this purpose. The department of education shall administer the fund.

The department of education may use monies from the fund to purchase materials designed to assist students to meet the Arizona academic standards and to achieve a passing score on the Arizona instrument to measure standards test in order to graduate from high school.

DD. The department of education may develop a classification label for school districts and charter school operators. If the department of education develops a classification label for school districts and charter school operators, the classification label may be developed from the following components:

1. Measures of academic progress.

2. Pupil assessment data.

3. The attendance rates and graduation rates of pupils who are educated in that charter school operator's charter schools or in that school district's schools.

4. The percentage of the parents of pupils enrolled in that charter school operator's charter schools or in that school district's schools that categorizes the quality of their child's education as excellent on a parental rating of school quality.

Ariz. Rev. Stat. § 15-251

§ 15-251. Powers and duties

The superintendent of public instruction shall:

1. Superintend the schools of this state.

2. Request the auditor general to investigate when necessary the accounts of school monies kept by any state, county or district officer.

3. Subject to supervision by the state board of education, apportion to the several counties the monies to which each county is entitled for the year. Apportionment shall be made as provided in chapter 9 of this title. [FN1]

4. Direct the work of all employees of the board who shall be employees of the department of education.

5. Execute, under the direction of the state board of education, the policies which have been decided upon by the state board.

6. Direct the performance of executive, administrative or ministerial functions by the department of education or divisions or employees thereof.

Ariz. Rev. Stat. § 15-741

§ 15-741. Assessment of pupils

A. The state board of education shall:

1. Adopt rules for purposes of this article pursuant to title 41, chapter 6. [FN1]

2. Adopt and implement an Arizona instrument to measure standards test to measure pupil achievement of the state board adopted academic standards in reading, writing and mathematics in at least four grades designated by the board. The board shall determine the manner of implementation. The board may administer assessments of the academic standards in social studies and science. Prior to the administration of the tests to pupils and following the statewide piloting of the tests, the board shall approve, at a public meeting, the Arizona instrument to measure standards test.

3. Adopt and implement a statewide nationally standardized norm-referenced achievement test in reading, language arts and mathematics, except that the superintendent of public instruction may determine additional grade levels for which pupils are tested. The tests shall be consistent with the state standards and shall be administered during the spring of each year between March 15 and May 1.

4. Ensure that the tests prescribed in this section are uniform throughout the state.

5. Ensure that the tests prescribed in this section are able to be scored in an objective manner

and that the tests are not intended to advocate any sectarian, partisan or denominational viewpoint.

6. Ensure that the results of the nationally standardized norm-referenced achievement tests established as provided in this article are comparable to associated grade equivalents, percentiles and stanines derived from a multistate sample.

7. Include within its budget all costs pertaining to the tests prescribed in this article. If sufficient monies are appropriated, the state board may provide norm-referenced achievement test services to school districts which request assistance in testing pupils in grades additional to those required by this section.

8. Use subtests of the statewide nationally standardized norm-referenced achievement test as designated by the state board to assess pupils in reading, language arts and mathematics, at a level appropriate for their grade level.

9. Survey teachers, principals and superintendents on achievement related nontest indicators, including information on graduation rates by ethnicity and dropout rates by ethnicity for each grade level. Before the survey, the state board of education shall approve at a public meeting the nontest indicators on which data will be collected. In conducting the survey and collecting data, the state board of education shall not violate the provisions of the family educational rights and privacy act (P.L. 93-380), as amended, [FN2] nor disclose personally identifiable information.

10. Establish a fair and consistent method and standard by which norm-referenced test scores from schools in a district may be evaluated taking into consideration demographic data. The board shall establish intervention strategies to assist schools with scores below the acceptable standard. The board shall annually review district and school scores and shall offer assistance to school districts in analyzing data and implementing intervention strategies. The board shall use the adopted norm-referenced test and methods of data evaluation for a period of at least ten years.

11. Participate in other assessments that provide national comparisons as needed.

B. The standardized norm-referenced achievement tests adopted by the state board as provided in subsection A shall be given annually. The tests shall be administered over a one week period between March 15 and May 1. Nontest indicator data and other information shall be collected at the same time as the collection of standardized norm-referenced achievement test data.

C. Local school district governing boards shall:

1. Administer the tests prescribed in subsection A.

2. Survey teachers, principals and superintendents on achievement related nontest indicator data as required by the state board including information related to district graduation and dropout rates. In conducting the survey and collecting

data, the governing board shall not violate the provisions of the family educational rights and privacy act (P.L. 93-380), as amended, nor disclose personally identifiable information.

D. A test for penmanship shall not be required pursuant to this article.

Ariz. Rev. Stat. § 15-751

§ 15-751. Definitions

In this section

1. "Bilingual education/native language instruction" means a language acquisition process for students in which much or all instruction, textbooks, or teaching materials are in the child's native language other than English.

2. "English language classroom" means a classroom in which English is the language of instruction used by the teaching personnel, and in which such teaching personnel possess a good knowledge of the English language. English language classrooms encompass both English language mainstream classrooms and sheltered English immersion classrooms.

3. "English language mainstream classroom" means a classroom in which the students either are native English language speakers or already have acquired reasonable fluency in English.

4. "English learner" or "limited English proficient student" means a child who does not speak English or whose native language is not English,

and who is not currently able to perform ordinary classroom work in English.

5. "Sheltered English immersion" or "structured English immersion" means an English language acquisition process for young children in which nearly all classroom instruction is in English but with the curriculum and presentation designed for children who are learning the language. Books and instructional materials are in English and all reading, writing, and subject matter are taught in English. Although teachers may use a minimal amount of the child's native language when necessary, no subject matter shall be taught in any language other than English, and children in this program learn to read and write solely in English. This educational methodology represents the standard definition of "sheltered English" or "structured English" found in educational literature.

Ariz. Rev. Stat. § 15-752

§ 15-752. English language education

Subject to the exceptions provided in § 15-753, all children in Arizona public schools shall be taught English by being taught in English and all children shall be placed in English language classrooms. Children who are English learners shall be educated through sheltered English immersion during a temporary transition period not normally intended to exceed one year. Local schools shall be permitted but not required to place in the same classroom English

learners of different ages but whose degree of English proficiency is similar. Local schools shall be encouraged to mix together in the same classroom English learners from different native-language groups but with the same degree of English fluency. Once English learners have acquired a good working knowledge of English and are able to do regular school work in English, they shall no longer be classified as English learners and shall be transferred to English language mainstream classrooms. As much as possible, current per capita supplemental funding for English learners shall be maintained. Foreign language classes for children who already know English shall be completely unaffected, as shall special educational programs for physically- or mentally-impaired students.

Ariz. Rev. Stat. § 15-753

§ 15-753. Parental waivers

A. The requirements of § 15-752 may be waived with the prior written informed consent, to be provided annually, of the child's parents or legal guardian under the circumstances specified in this section. Such informed consent shall require that said parents or legal guardian personally visit the school to apply for the waiver and that they there be provided a full description of the educational materials to be used in the different educational program choices and all the educational opportunities available to the child. If a parental waiver has been granted, the affected child

shall be transferred to classes teaching English and other subjects through bilingual education techniques or other generally recognized educational methodologies permitted by law. Individual schools in which 20 students or more of a given grade level receive a waiver shall be required to offer such a class; in all other cases, such students must be permitted to transfer to a public school in which such a class is offered.

B. The circumstances in which a parental exception waiver may be applied for under this section are as follows:

1. Children who already know English: the child already possesses good English language skills, as measured by oral evaluation or standardized tests of English vocabulary comprehension, reading, and writing, in which the child scores approximately at or above the state average for his grade level or at or above the 5th grade average, whichever is lower; or

2. Older children: the child is age 10 years or older, and it is the informed belief of the school principal and educational staff that an alternate course of educational study would be better suited to the child's overall educational progress and rapid acquisition of basic English language skills; or

3. Children with special individual needs: the child already has been placed for a period of not less than thirty calendar days during that school year in an English language classroom and it is subsequently the informed belief of the school

principal and educational staff that the child has such special and individual physical or psychological needs, above and beyond the child's lack of English proficiency, that an alternate course of educational study would be better suited to the child's overall educational development and rapid acquisition of English. A written description of no less than 250 words documenting these special individual needs for the specific child must be provided and permanently added to the child's official school records, and the waiver application must contain the original authorizing signatures of both the school principal and the local superintendent of schools. Any such decision to issue such an individual waiver is to be made subject to the examination and approval of the local school superintendent, under guidelines established by and subject to the review of the local governing board and ultimately the state board of education. Teachers and local school districts may reject waiver requests without explanation or legal consequence, the existence of such special individual needs shall not compel issuance of a waiver, and the parents shall be fully informed of their right to refuse to agree to a waiver.

Ariz. Rev. Stat. § 15-754

§ 15-754. Legal standing and parental enforcement

As detailed in §§ 15-752 and 15-753, all Arizona school children have the right to be provided at their local school with an English language public education. The

parent or legal guardian of any Arizona school child shall have legal standing to sue for enforcement of the provisions of this statute, and if successful shall be awarded normal and customary attorney's fees and actual and compensatory damages, but not punitive or consequential damages. Any school board member or other elected official or administrator who willfully and repeatedly refuses to implement the terms of this statute may be held personally liable for fees and actual and compensatory damages by the child's parents or legal guardian, and cannot be subsequently indemnified for such assessed damages by any public or private third party. Any individual found so liable shall be immediately removed from office, and shall be barred from holding any position of authority anywhere within the Arizona public school system for an additional period of five years.

Ariz. Rev. Stat. § 15-755

§ 15-755. Standardized testing for monitoring education progress

In order to ensure that the educational progress of all Arizona students in academic subjects and in learning English is properly monitored, a standardized, nationally-normed written test of academic subject matter given in English shall be administered at least once each year to all Arizona public schoolchildren in grades two through twelve. All students with disabilities shall be included in all general state and district assessments, with appropriate accommodations and

alternate assessments where necessary and as indicated in their respective individual education program, in accordance with 20 United States Code § 1412. The particular test to be used shall be selected by the office of the state superintendent of public instruction, and it is intended that the test shall generally remain the same from year to year. The national percentile scores of students shall be confidentially provided to individual parents, and the aggregated percentile scores and distributional data for individual schools and school districts shall be made publicly available on an internet web site, and the scores for students classified as "limited-English" shall be separately subaggregated and made publicly available there as well. Although administration of this test is required solely for monitoring educational progress, Arizona public officials and administrators may utilize these test scores for other purposes as well if they so choose.

Ariz. Rev. Stat. § 15-756

§ 15-756. Identification of English language learners

A. The primary or home language for all new pupils who enroll in a school district or charter school shall be identified in a manner prescribed by the superintendent of public instruction.

B. The English language proficiency of all pupils with a primary or home language other than English shall be assessed through the administration of

English language proficiency assessments in a manner prescribed by the superintendent of public instruction. The test scores adopted by the superintendent as indicating English language proficiency shall be based on the test publishers' designated scores. The department shall annually request an appropriation to pay for the purchase of all language proficiency assessments, scoring and ancillary materials as prescribed by the department for school districts and charter schools.

C. If it is determined that a pupil is not English language proficient, the pupil shall be classified as an English language learner and shall be enrolled in an English language education program pursuant to § 15-752 or 15-753.

Ariz. Rev. Stat. § 15-756.01

§ 15-756.01. Arizona English language learners task force; research based models of structured English immersion for English language learners; budget requests; definitions

A. The Arizona english language learners task force is established in the department of education. The task force shall consist of:

1. Three members appointed by the superintendent of public instruction.

2. Two members who are appointed by the governor.

3. Two members who are appointed by the president of the senate.

4. Two members who are appointed by the speaker of the house of representatives.

B. Members of the task force shall serve four year terms. Members of the task force shall elect a chairperson from among the members of the task force. The department of education shall provide adequate staff support for the task force.

C. By September 1, 2006, the task force shall develop and adopt research based models of structured English immersion programs for use by school districts and charter schools. The models shall take into consideration at least the size of the school, the location of the school, the grade levels at the school, the number of english language learners and the percentage of english language learners. The models shall be limited to programs for english language learners to participate in a structured English immersion program not normally intended to exceed one year. The task force shall identify the minimum amount of english language development per day for all models. The task force shall develop separate models for the first year in which a pupil is classified as an english language learner that includes a minimum of four hours per day of english language development.

D. The research based models of structured English immersion adopted by the task force shall be the most

cost-efficient models that meet all state and federal laws.

E. The research based models of structured English immersion shall be limited to a regular school year and school day. Instruction outside the regular school year or school day shall be provided with compensatory instruction and may be eligible for funding from the statewide compensatory instruction fund established by § 15-756.11.

F. The research based models of structured English immersion shall be submitted by the task force to the president of the senate, the speaker of the house of representatives, the governor and the state board of education. At least thirty days before adoption, the task force shall submit the research based models of structured English immersion to the joint legislative budget committee for review.

G. The task force shall review research based models of structured English immersion annually and delete, add or modify the existing models. When adopting or modifying english language learner programs, the task force shall review and consider the information and data obtained as a result of the department of education's monitoring of english language learner programs pursuant to § 15-756.08.

H. The task force shall establish procedures for school districts and charter schools to determine the incremental costs for implementation of the research based models of structured English immersion developed by the task force.

I. The task force shall establish a form for school districts and charter schools to determine the structured English immersion budget request amount. Notwithstanding any other law, the maximum amount of the budget request shall be the incremental costs of the model selected offset by the following monies:

1. All federal title III monies and any other federal monies designated solely for the educational needs of english language learners.

2. The portion of title I and title II A [FN1] monies determined by the english language learner population as a percentage of the qualified population.

3. The portion of impact aid monies determined by the english language learner population as a percentage of the qualified population. A school district or charter school shall only apply unexpended impact aid monies to english language learner programs after it has applied its impact aid monies for other allowable uses as permitted by state law.

4. The portion of desegregation monies levied pursuant to § 15-910 determined by the english language learner population as a percentage of the qualified population.

5. The ELL support level weight prescribed in § 15-943.

J. The difference calculated pursuant to subsection I of this section shall be the maximum amount of the structured English immersion budget request pursuant

to § 15-756.03 for monies from the Arizona structured english immersion fund established by § 15-756.04. Beginning July 15, 2008, school districts and charter schools shall not include the incremental costs of any pupil who is classified as an english language learner after July 1, 2007 and who has been classified as an english language learner for more than two years in the calculation of the school district's or charter school's structured English immersion budget request.

K. In consultation with the auditor general, the department of education shall develop and adopt forms to be used by school districts and charter schools to submit budget requests for the Arizona structured english immersion fund, including the form prescribed in subsection I of this section.

L. For the purposes of this section:

1. "Compensatory instruction" has the same meaning prescribed in § 15-756.11.

2. "Incremental costs" means costs that are associated with a structured English immersion program pursuant to § 15-752 or a program pursuant to § 15-753 and that are in addition to the normal costs of conducting programs for english proficient students. Incremental costs do not include costs that replace the same types of services provided to english proficient students or compensatory instruction.

Ariz. Rev. Stat. § 15-756.02

§ 15-756.02. School districts and charter schools; English language learner models; adoption and implementation

A. Each school district governing board and each governing body of a charter school shall select one or more of the task force approved models for structured English immersion for implementation on a school by school basis.

B. If a school district or charter school wants to adopt an english language learner program that is not based on a model adopted by the task force, the school district or charter school shall first submit the proposed program along with supporting documentation regarding the expected outcomes of the program on the district's or charter school's english language learner students to the task force for approval.

C. On receipt of a proposed program from a school district or charter school, the task force may do one of the following:

1. Approve the proposed program.

2. Provide limited approval subject to specific stipulations prescribed by the state board.

3. Reject the proposed program and identify a model approved by the task force for the school district or charter school to adopt.

D. School districts and charter schools shall include a copy of the adopted english language learner program in the annual report required in § 15-756.10.

Ariz. Rev. Stat. § 15-756.03

§ 15-756.03. Structured English immersion; budget request

A. If a school district or charter school qualifies to submit a budget request based on the form prescribed in § 15-756.01, subsection I, the school district or charter school shall submit a structured english immersion budget request on a school by school basis. The budget request shall be for a specific amount of supplemental monies from the Arizona structured English immersion fund established by § 15-756.04.

B. Each school district or charter school structured english immersion budget request shall include the signature of the superintendent of the school district and the chief financial officer of the school district or the principal of the charter school and the chief financial officer of the charter school that certifies that the information in the budget request is true to the best of that person's knowledge and has been calculated in accordance with the form prescribed in § 15-756.01, subsection I and that monies from the Arizona structured English immersion fund established by § 15-756.04 will not be used to supplant any federal, state or local monies, including desegregation monies levied pursuant to § 15-910, used for english

language learners that were budgeted for english language learners as of February 23, 2006.

C. Beginning July 1, 2007, each school district and charter school that submits a structured English immersion budget request shall submit the budget request to the department of education annually on or before September 15. The department of education shall verify the budget request of each school district and charter school for accuracy and compliance with the form prescribed in § 15-756.01, subsection I. The department shall collect all school district and charter school budget requests and submit them to the legislature for funding from the Arizona structured English immersion fund established by § 15-756.04 at the same time as the department's budget request.

Ariz. Rev. Stat. § 15-756.04

§ 15-756.04. Arizona structured English immersion fund

A. The Arizona structured English immersion fund is established. The department of education shall administer the fund.

B. The department shall submit an annual request for an appropriation for the purposes of this section.

C. In addition to the ELL support level weight prescribed in § 15-943, the department shall distribute monies from the fund to school districts and charter schools in an amount specified in the budget request prescribed in § 15-756.03, subsection C.

Monies from the fund established by this section and monies for the ELL support level weight prescribed in § 15-943 shall not be distributed for more than two fiscal years for the same pupil. Nothing in this subsection shall be construed to prohibit a school district or charter school from receiving monies from the statewide compensatory instruction fund established by § 15-756.11 for more than two fiscal years for the same pupil.

D. The superintendent of public instruction shall attempt to obtain the maximum amount of federal funding that is available for english language learner programs.

E. Each school district and charter school shall establish a local level structured English immersion fund to receive monies distributed from the Arizona structured English immersion fund. Monies in local level structured English immersion funds shall be spent only to provide instruction to english language learners. The auditor general shall modify the budget format, financial record requirements, accounting forms and financial report forms in accordance with this subsection. In consultation with the department of education, the auditor general shall provide support and guidance to assist school districts and charter schools in complying with this subsection. Documents developed pursuant to this subsection shall be reviewed by the Arizona english language learners task force established by § 15-756.01 and the joint legislative budget committee.

F. School districts and charter schools shall use monies from the fund to supplement existing programs for english language learners. Monies from the fund shall not be used to supplant available monies used to pay for the normal costs of conducting programs for english proficient students.

Ariz. Rev. Stat. § 15-756.05

§ 15-756.05. Reassessment and reclassification of English language learners

A. The process of reassessment of english language learners for the purpose of determining english language proficiency shall be conducted at least annually at the end of each school year in a manner prescribed by the superintendent of public instruction.

B. A pupil who scores at or above the test publisher's designated score for english proficiency shall be considered english proficient. The pupil shall no longer be classified as an english language learner and shall be reclassified as english proficient.

C. A pupil who has attained english proficiency pursuant to this section shall be transferred to english language mainstream classrooms.

Ariz. Rev. Stat. § 15-756.06

§ 15-756.06. Reevaluation of former English language learners

The english language proficiency of each pupil previously classified as an english language learner within the last two years shall be tested annually at the end of each school year, in the same manner as provided in § 15-756, subsection B. The superintendent of public instruction shall prescribe the manner in which pupils are reevaluated. Pupils who fail to demonstrate english proficiency on the reassessment test in the two years following their exit from structured English immersion, subject to parental consent, shall be reenrolled in structured English immersion pursuant to § 15-752 and may be provided compensatory instruction as defined in § 15-756.11.

Ariz. Rev. Stat. § 15-756.07

§ 15-756.07. Office of English language acquisition services; duties

The office of english language acquisition services is established in the department of education. The department of education, office of english language acquisition services, shall:

1. Develop guidelines for monitoring school districts and charter schools to ensure compliance with all federal and state laws regarding english language learners.

2. In consultation with county school superintendents, develop regional programs to enhance all aspects of training for teachers and administrators.

3. Publish english language learner policy guidelines for school districts and charter schools that include a list of relevant rules, regulations and statutes relating to english language learner programs to notify school districts and charter schools of their responsibilities.

4. Provide technical assistance to school districts and charter schools to implement structured English immersion programs.

Ariz. Rev. Stat. § 15-756.08

§ 15-756.08. Monitoring; corrective action plan

A. The superintendent of public instruction shall direct the office of english language acquisition services in the department of education to:

1. Monitor each year at least twelve school districts or charter schools from the fifty school districts or charter schools in this state with the highest number of english language learners. The department of education shall monitor all fifty school districts or charter schools with the highest number of english language learners in this state at least once every four years.

2. Monitor each year at least ten school districts or charter schools that are not included in the

fifty school districts or charter schools described in paragraph 1.

3. Monitor each year at least ten school districts or charter schools that are not required to provide instruction for english language learners for a majority of their grade levels.

4. Choose, based on the department's review of reports submitted by school districts and charter schools, the school districts and charter schools described in paragraphs 1, 2 and 3.

5. Select a random sample of three hundred english language learners each month to determine:

(a) How many of the sample can read the randomly ordered alphabet in thirty seconds or less.

(b) How many of the sample can read a randomly sorted list of thirty single-syllable words in one minute or less.

B. The monitoring required by this section shall be on-site monitoring and shall include classroom observations, curriculum reviews, faculty interviews, student records, a review of english language learner programs and an analysis of programmatic effectiveness, at a minimum, to include prior year data that analyze the progress of english language learners.

C. Based on the results of the monitoring, the department shall determine whether or not the school district or charter school is complying with state and federal laws applicable to english language learners.

D. The department shall issue a report of the results of the monitoring within forty-five days after completing the monitoring.

E. Within sixty days following the issuance of the department's report, the school district or charter school receiving the report shall prepare and submit to the department a corrective action plan, in a manner prescribed by the state board of education, that sets forth steps that will be taken to correct the deficiencies, if any, noted in the department's report.

F. Within thirty days after receiving a school district's or charter school's corrective action plan, the department shall review the corrective action plan and may require changes to the corrective action plan.

G. After the department has reviewed a school district's or charter school's corrective action plan and made any changes the department deems necessary, the department shall return the corrective action plan to the school district or charter school.

H. Within thirty days after receiving a corrective action plan back from the department, the school district or charter school shall begin implementing the measures set forth in the corrective action plan.

I. The department shall conduct a follow-up evaluation of the school district or charter school within one year after the department returned the corrective action plan to the school district or charter school.

J. In conducting the follow-up evaluation, if the department finds that the school district or charter school is not in compliance with state and federal laws applicable to english language learners, the department shall refer the school district or charter school to the state board of education for a finding of noncompliance. A school district or charter school found by the board to be noncompliant shall not continue to receive any monies from the Arizona structured English immersion fund established by § 15-756.04 for english language learners and shall not reduce the amount of monies spent on the school district's or charter school's english language learner programs despite the loss of monies caused by the noncompliance.

K. The department shall monitor each school district or charter school that the state board of education has found to be noncompliant and that is not receiving Arizona structured English immersion fund monies pursuant to subsection J of this section to ensure that the school district or charter school does not reduce the amount of monies spent on the school district's or charter school's english language learner programs despite the loss of Arizona structured English immersion fund monies caused by the noncompliance.

Ariz. Rev. Stat. § 15-756.09

§ 15-756.09. Teacher training

A. The state board of education shall determine the qualifications necessary for a provisional and full structured English immersion endorsement.

B. Training may be allowed that is not provided by a college or university to substitute for any of the courses required for a structured English immersion endorsement or a bilingual education endorsement if all of the following conditions apply:

1. The state board of education has reviewed the curricula, textbooks, grading procedures and attendance policies and determined that the training is comparable in amount, scope and quality to a course offered by a college or university for a structured English immersion or bilingual education endorsement.

2. The training meets the professional teaching standards adopted by the state board of education.

3. The state board of education has reviewed the qualifications of the instructor and determined that the instructor has sufficient experience to effectively conduct the training.

C. The state board of education shall require all approved teacher training programs that provide a degree in education to require courses that are necessary to obtain a full structured English immersion endorsement.

Ariz. Rev. Stat. § 15-756.10

§ 15-756.10. Reporting

The office of english language acquisition services in the department of education shall:

1. Require each school district and charter school to annually submit a report to the department of education that includes the following information identified by grade level and by school:

(a) The total number of pupils who are classified as english language learners as verified by the student accountability information system established by § 15-1041.

(b) The number of pupils who are classified as english language learners for the first time as verified by the student accountability information system established by § 15-1041.

(c) The number of english language learners who achieved english proficiency in the past academic year and who have been reclassified as english proficient as verified by the student accountability information system established by § 15-1041.

(d) The number of pupils who are enrolled in each type of language acquisition program offered by the school district or charter school as verified by the student accountability information system established by § 15-1041.

(e) If requested by the department of education, the test data used to determine english proficiency.

2. Determine the mobility of english language learners within the same school district and the mobility of english language learners to other school districts and charter schools through the student accountability information system established by § 15-1041.

3. Submit an annual report to the joint legislative budget committee that includes an itemized list of all federal monies received by the department for english language learners, a list of how much of these monies were distributed to school districts on a district by district basis and the purposes for which these federal monies are designated. The department shall submit a copy of this report to the secretary of state and the director of the Arizona state library, archives and public records.

4. Submit an annual report to the governor, the president of the senate, the speaker of the house of representatives and the state board of education that includes a detailed analysis of whether and to what extent pupils are benefiting academically from compensatory instruction as defined in § 15-756.11 and a comparison of the academic achievement of pupils before and after receiving compensatory instruction as defined in § 15-756.11. The department shall submit a copy of this report to the secretary of state and the director of the Arizona state library, archives and public records.

5. Present a detailed annual summary of all english language learner programs and funding at a public meeting of the state board of education.

6. Present a summary of information relating to the demonstrated success of schools and school districts at achieving english proficiency for english language learners.

Ariz. Rev. Stat. § 15-756.11

§ 15-756.11. Statewide compensatory instruction fund; reporting; definition

A. The statewide compensatory instruction fund is established. The department of education shall administer the fund.

B. To be eligible for monies appropriated pursuant to this section, a school district or charter school must demonstrate to the department of education that it has established a satisfactory compensatory instruction program. The department of education shall distribute monies from the fund to school districts and charter schools in an amount determined by the department for compensatory instruction costs.

C. School districts and charter schools shall annually submit written compensatory instruction budget requests to the department on or before July 15 for monies from the fund on a form developed by the department. The requests shall include an analysis of compensatory instruction effectiveness.

D. The written requests submitted by school districts and charter schools shall be signed by the superintendent of the school district and the chief financial officer of the school district or the principal of the charter school and the chief financial officer of the charter school and monies from the statewide compensatory instruction fund shall not be used to supplant any federal, state or local monies, including desegregation monies levied pursuant to § 15-910, used for english language learners that were budgeted for english language learners as of February 23, 2006.

E. School districts and charter schools shall use monies from the fund to supplement existing programs. Monies shall not be used to supplant any federal, state or local monies, including desegregation monies levied pursuant to § 15-910, used for compensatory instruction that were budgeted for english language learners as of February 23, 2006.

F. Each school district and charter school shall establish a local level compensatory instruction fund to receive monies distributed from the statewide compensatory instruction fund. Monies in local level compensatory instruction funds shall be spent only for compensatory instruction. The auditor general shall modify the budget format, financial record requirements, accounting forms and financial report forms in accordance with this subsection. In consultation with the department of education, the auditor general shall provide support and guidance to assist school districts and charter schools in complying with

this subsection. Documents developed pursuant to this subsection shall be reviewed by the Arizona english language learners task force established by § 15-756.01 and the joint legislative budget committee.

G. For the purposes of this section, "compensatory instruction" means programs in addition to normal classroom instruction that may include individual or small group instruction, extended day classes, summer school or intersession school and that are limited to improving the english proficiency of current english language learners and pupils who were english language learners and who have been reclassified as english proficient within the previous two years.

United States District Court, D Arizona.
Miriam FLORES, individually and as a parent of Miriam Flores, a minor child, et. al., Plaintiffs,
v.
State of ARIZONA, et. al., Defendants.

No. 92-596-TUC-ACM.

EVIDENTIARY HEARING

January 9, 2007

The following documents were entered as exhibits.

* * *

EXHIBIT 218

FY 2004-FY 2005-FY 2006 Reclassified FEP Counts-Nogales USD

Fiscal Year	District CTDS	District Name	Number Reclassified	Total ELL	Percent Reclassified
2004	120201000	Nogales Unified District	39	3888	1%
2005	120201000	Nogales Unified District	930	3995	23%
2006	120201000	Nogales Unified District	1046	3023	35%

EXHIBIT 220

SPRING 2006 AIMS PERFORMANCE COMPARISONS

MATH						READING						WRITING					
GRADE 3		GRADE 4		GRADE 5		GRADE 3		GRADE 4		GRADE 5		GRADE 3		GRADE 4		GRADE 5	
District Average	454.6	District Average	482.3	District Average	514.5	District Average	454.8	District Average	461.8	District Average	487.3	District Average	442.4	District Average	482.9	District Average	514.9
ELL Average	425.1	ELL Average	445.3	ELL Average	474.9	ELL Average	422.8	ELL Average	424.5	ELL Average	445.3	ELL Average	421.8	ELL Average	455.0	ELL Average	464.9
Re-classified ELL Average	474.3	Re-classified ELL Average	503.5	Re-classified ELL Average	525.1	Re-classified ELL Average	477.7	Re-classified ELL Average	482.6	Re-classified ELL Average	498.6	Re-classified ELL Average	460.1	Re-classified ELL Average	498.7	Re-classified ELL Average	528.8
English Only Average	479.0	English Only Average	489.9	English Only Average	530.0	English Only Average	473.2	English Only Average	473.4	English Only Average	503.7	English Only Average	438.8	English Only Average	487.2	English Only Average	528.4
GRADE 6		GRADE 7		GRADE 8		GRADE 6		GRADE 7		GRADE 8		GRADE 6		GRADE 7		GRADE 8	
District Average	517.9	District Average	538.1	District Average	551.0	District Average	488.1	District Average	497.9	District Average	514.8	District Average	561.6	District Average	558.8	District Average	558.3
ELL Average	473.3	ELL Average	504.0	ELL Average	516.2	ELL Average	446.4	ELL Average	455.5	ELL Average	484.2	ELL Average	516.6	ELL Average	510.4	ELL Average	509.4
Re-classified ELL Average	539.2	Re-classified ELL Average	551.2	Re-classified ELL Average	563.6	Re-classified ELL Average	506.3	Re-classified ELL Average	513.2	Re-classified ELL Average	524.2	Re-classified ELL Average	538.5	Re-classified ELL Average	579.2	Re-classified ELL Average	576.6
English Only Average	535.7	English Only Average	556.7	English Only Average	565.0	English Only Average	514.4	English Only Average	524.7	English Only Average	536.7	English Only Average	577.1	English Only Average	578.2	English Only Average	574.8

Spring 2006 AIMS

Numbers according to ELL proficiency entry on AIMS demographics

ELL Students

Grade	Math	FFB	A	M	E	%M+E	Reading	FFB	A	M	E	%M+E	Writing	FFB	A	M	E	%M+E
3	**183**	24	59	95	4	54%	**183**	26	83	70	4	40%	**183**	8	80	94	1	52%
4	**166**	31	62	69	4	44%	**165**	46	88	31	0	19%	**165**	9	69	86	0	52%
5	**96**	17	27	49	2	53%	**96**	22	52	21	0	22%	**96**	11	51	33	0	34%
6	**150**	67	49	32	2	23%	**150**	52	77	21	0	14%	**150**	5	39	106	0	71%
7	**157**	56	38	60	3	40%	**157**	50	86	21	0	13%	**157**	18	35	104	0	66%
8	**137**	47	51	37	2	28%	**137**	25	70	42	0	31%	**137**	10	60	67	0	49%

Reclassified Students

Grade	Math	FFB	A	M	E	%M+E	Reading	FFB	A	M	E	%M+E	Writing	FFB	A	M	E	%M+E
3	**222**	2	8	147	65	95%	**222**	0	18	173	31	92%	**222**	1	33	182	6	85%
4	**279**	2	22	167	88	91%	**280**	4	41	209	26	84%	**280**	2	29	248	1	89%
5	**312**	7	29	198	78	88%	**312**	4	54	237	17	81%	**312**	3	58	250	1	80%
6	**274**	3	48	169	54	81%	**274**	5	65	195	9	74%	**274**	2	6	236	30	97%
7	**305**	12	43	212	38	82%	**304**	6	78	210	10	72%	**304**	3	3	296	2	98%
8	**314**	25	69	186	33	70%	**314**	10	80	215	8	71%	**314**	1	16	296	1	95%

Non ELL Students

Grade	Math	FFB	A	M	E	%M+E	Reading	FFB	A	M	E	%M+E	Writing	FFB	A	M	E	%M+E
3	**41**	2	3	21	15	88%	**41**	3	3	26	9	85%	**41**	2	11	26	2	68%
4	**30**	2	2	17	9	87%	**30**	2	5	21	2	77%	**30**	0	8	22	0	73%
5	**29**	3	2	13	11	83%	**29**	1	6	17	5	76%	**29**	1	6	21	1	76%
6	**48**	3	5	32	8	83%	**48**	2	4	38	4	88%	**48**	1	1	39	7	96%
7	**73**	5	9	45	14	81%	**74**	2	14	56	2	78%	**74**	2	1	70	1	96%
8	**59**	6	11	33	9	71%	**59**	3	7	47	2	83%	**59**	0	5	54	0	92%

[LOGO] **Title III Ell Data Collection –FY 2006**
Nogales Unified District – AMAO Report

Application Menu : : LEA List | School List | Upload File | Help : : 2006 | 2007

☒ **Back to School List**

OVERALL Determinations: Y

Grade Range	Percent Making Progress	Met 12% Progress	Percent Reclassified	Met 12% Reclassified	Met AYP
K-2	74%	Y	38%	Y	
3-5	74%	Y	38%	Y	Y
6-8	70%	Y	31%	Y	Y
9-12	88%	Y	29%	Y	Y

School Improvement Status: None

OPPOSITION BRIEF

113

Nos. 08-289 and 08-294

Supreme Court, U.S.
FILED
DEC 1 - 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF ARIZONA,

Petitioner,

v.

MIRIAM FLORES, et al.,

Respondents.

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES and PRESIDENT OF THE ARIZONA SENATE,

Petitioners,

v.

MIRIAM FLORES, et al.,

Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

TERRY GODDARD,
Attorney General
MARY O'GRADY,
Solicitor General
SUSAN P. SEGAL,
Assistant Attorney General
OFFICE OF THE
ATTORNEY GENERAL
1275 West Washington
Phoenix, Arizona 85007

JOSÉ A. CÁRDENAS
DAVID D. GARNER
KIMBERLY ANNE DEMARCHI
Counsel of Record
LEWIS AND ROCA LLP
40 North Central Avenue
Phoenix, Arizona 85004
(602) 262-5728

Counsel for Respondents State of Arizona and the Arizona State Board of Education

December 1, 2008

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

In 2000, the District Court concluded that Arizona violated the Equal Educational Opportunities Act of 1974 ("EEOA"), which requires states to "take appropriate action to overcome language barriers" for English Language Learners ("ELLs"). The District Court found that Arizona violated the EEOA because it failed to fund ELL instruction in a manner rationally related to the cost of the state's chosen instructional program.

1. In 2006, the Arizona Legislature enacted legislation to bring the state into compliance with the EEOA, but lower courts concluded that legislation failed to calculate funding for the state's ELL program in a manner that complied with the No Child Left Behind Act ("NCLB") and other requirements. In this context, does a state comply with the mandate of the EEOA to take "appropriate action" to overcome language barriers faced by English Language Learners (ELLs) because it complies with the NCLB's requirements to track aggregate student performance and intervene in underperforming schools.

2. Whether relief from the judgment in this case is appropriate under Rule 60(b)(5) if some specific conditions resulting from the violation of federal law have been ameliorated even if Arizona law fails to fund the calculated cost of the state's instructional program through legally available funds.

QUESTIONS PRESENTED – Continued

3. Whether the Ninth Circuit incorrectly interpreted the EEOA to require earmarked funding for English language instruction.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
INTRODUCTION	1
STATEMENT	3
I. Procedural History of This Litigation Prior to the Passage of HB 2064	3
II. House Bill 2064	7
III. Procedural History After the Enactment of HB 2064	12
REASONS TO DENY THE PETITIONS	15
I. The Unique Issues Raised by Arizona's Chosen ELL Funding Scheme Make this an Inappropriate Vehicle for Examining the Relationship Between NCLB and the EEOA	15
II. Even if the Ninth Circuit's Decision Had Conflicted with the Prior Decisions of this Court or Other Circuits, the Unique Issues Raised by Arizona's Chosen ELL Funding Scheme and the Procedural History of this Case Would Preclude Rule 60(b) Relief at this Time Under Any Available Standard	18
III. Neither the District Nor the Circuit Court Required Earmarked Funding Under 20 U.S.C. § 1703(f)	22
CONCLUSION	23
APPENDIX	App. 1

TABLE OF AUTHORITIES

Page

FEDERAL CASES

CASE

Agostini v. Felton, 521 U.S. 203 (1997) 14

Bell v. New Jersey, 461 U.S. 773 (1983) 21

Bennett v. Kentucky Dep't of Educ., 470 U.S. 656 (1985) 21

Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981) 1, 3

Flores v. State of Arizona, 172 F. Supp. 2d 1225 (D. Ariz. 2000) 3

Flores v. State of Arizona, 516 F.3d 1140 (9th Cir. 2008) 14

Indiana, Dep't of Pub. Instruction v. Bell, 728 F.2d 938 (7th Cir. 1984) 21

Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992) 14, 20

RULES, REGULATIONS AND STATUTES

United States Code:

20 U.S.C. § 1234c 21

20 U.S.C. § 1703(f) 3, 16, 20, 22

20 U.S.C. § 6314(a)(2)(B) 21

20 U.S.C. § 6315(b)(3) 21

20 U.S.C. § 6613(f) 21

20 U.S.C. § 6623(b) 21

TABLE OF AUTHORITIES – Continued

Page

20 U.S.C. § 6825(g) 21

20 U.S.C. § 6842(a)(3)(A) 16

20 U.S.C. § 6847 16

20 U.S.C. § 7801(21) 17

20 U.S.C. § 7902 ..... 17, 20

Arizona Constitution:

art. XI, § 1(A) 7

Arizona Revised Statutes:

A.R.S. § 15-543(2)(b) 8

A.R.S. § 15-756.01 9

A.R.S. § 15-756.01(I) 10, 18, 21

A.R.S. § 15-756.01(J) 11, 20

A.R.S. § 15-756.04(C) 10, 20

A.R.S. § 15-756.05(B) 11

A.R.S. § 15-756.11 10

A.R.S. § 15-756.11(G) 10, 11

A.R.S. § 15-943 ..... 7, 8, 10

A.R.S. § 15-945 7

A.R.S. § 15-943(2) 10, 20

A.R.S. § 15-962 8

A.R.S. § 15-971 7

A.R.S. § 15-2001-2401 8

INTRODUCTION

In January 2000, the District Court found that Arizona violated the EEOA because it failed to fund ELL instruction in a manner rationally related to the cost of its chosen instructional program. While the District Court noted resulting inadequacies in the instructional program in place in the Nogales Unified School District, applying the analysis set forth by the Fifth Circuit in *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981), it declined to require any particular programmatic changes and instead mandated that Arizona fund its chosen instructional program in a way that was rationally related to the cost of that program.

Arizona did not appeal the judgment. Instead, the state attempted to comply by providing additional interim funding and spending the subsequent six years attempting to design a system of funding that would be rationally related to instructional cost. In March 2006, Arizona enacted legislation – House Bill 2064 – establishing a system intended to do just that.

Since 2006, the proceedings in this case have necessarily focused on HB 2064, which now governs ELL instructional funding in Arizona. The unique issues associated with HB 2064 make this case a poor vehicle for reviewing the questions that the petitions present.

In order to address the questions presented by the petitions, the Court would need to resolve whether Arizona is in fact in continuing violation of

the law based on the provisions of HB 2064 – an issue that neither petition for certiorari in this case raises but which controlled the result below. Specifically, the lower courts held that HB 2064 runs afoul of federal laws that govern the use of federal educational funds granted to the states for elementary and secondary instruction, including the NCLB itself.

HB 2064 builds on Arizona's existing system of statewide funding for instructional programs, creating a process where each school district would calculate the cost of implementing a prescribed instructional program in that district and then would request state funding consistent with the calculated cost. But HB 2064 relies on federal funds to meet that calculated cost and cuts off most state funding entirely after two years, regardless of student progress in overcoming language barriers. The unique legal problems raised by the state's use of federal funds in the calculation of state aid for its ELL program and the two-year limit on most ELL funding make this case an inappropriate vehicle to review the standards for relief under Rule 60(b) and the interplay between NCLB and the EEOA. Accordingly, there is no basis for certiorari at this time.

STATEMENT

I. Procedural History of This Litigation Prior to the Passage of HB 2064

Plaintiffs, a group of ELL students and parents of ELL students in the Nogales Unified School District, filed this lawsuit in 1992, naming as defendants the State of Arizona, the Arizona State Board of Education, and the Superintendent of Public Instruction for the State of Arizona. Plaintiffs asked for declaratory relief regarding the State's alleged failure to comply with, among other things, its obligations to "take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs," as required by the EEOA. Appendix to Petition in No. 08-289 ("Superintendent's App.") 196 (20 U.S.C. § 1703(f)).

In January 2000, the District Court entered a declaratory judgment in favor of Plaintiffs on their EEOA claim. Applying the three-prong analysis developed by the Fifth Circuit in *Castaneda v. Pickard*, 648 F.2d 989, 1008-09 (5th Cir. 1981), the District Court found that while Arizona had chosen an ELL instructional program within the appropriate bounds of its discretion, its funding for the chosen program was arbitrary and capricious and bore no relation to the actual funding needed to meet the State's obligations under the EEOA. *Flores v. State of Arizona*, 172 F. Supp. 2d 1225, 1238-39 (D. Ariz. 2000), Appendix to Petition in No. 08-294 ("Intervenors' App.") at 147-48a, 150-51a. The District Court

also made findings of fact regarding the effects of this lack of rational funding on the instruction available to ELL students in the Nogales district. Intervenors' App. 149-51a. The bipartisan group of elected officials responsible for acting on behalf of the State defendants at that time did not appeal from the judgment.

For the next four years, acting on motions filed by the Plaintiffs, the District Court issued a series of orders setting deadlines for the state to provide appropriate funding for ELL programs. (Clerk's Record ("CR") 222, 226, 233, 249, 290.) None of those orders prescribed any specific program for ELL instruction to be pursued by the State; rather they required that the State provide funding for the actual cost of its chosen ELL instructional program. (*Id.*) None of those orders were appealed.

Except for an interim funding measure passed in 2002, no ELL funding legislation was enacted, and in December 2004 Plaintiffs filed a Third Motion for Injunctive Relief. (CR 284.) The District Court granted that motion, stating that "[t]hus far, the legislature has failed to meet the Court's deadlines as well as their own." (CR 290 at 5). The District Court then ordered "that the legislature comply with the Court's January 2000 Declaratory Judgment by the end of this legislative session." *Id.* The executive and legislative branches of state government could not reach agreement on legislation and the deadline was not met.

In August 2005, Plaintiffs filed another motion for sanctions, asking that sanctions be imposed with a thirty-day grace period to permit the executive and legislative branches to enact legislation to bring the State into compliance. (CR 296 at 7-8.) Plaintiffs suggested an injunction prohibiting the State from receiving federal highway funds as an appropriate incentive to foster compliance. (*Id.* at 9.) The State, the State Board of Education, and the Superintendent all opposed Plaintiff's motion, arguing that sanctions of any kind were inappropriate and asking for additional guidance from the Court regarding the meaning of its orders to assist in breaking an impasse between branches of government regarding what was required to bring the State into compliance. (CR 303.)

The District Court granted the sanctions motion on December 15, 2005, but declined to enjoin Arizona's access to highway funds, noting its obligation to use "the least possible power" to ensure compliance with its orders. Intervenors' App. 171a. The District Court instead gave the State until January 25, 2006 to pass legislation complying with the Court's prior orders, with daily monetary fines to commence after that date and to be imposed, on an escalating scale, until legislation was passed. Intervenors' App. 173a. The District Court again did not prescribe any particular educational program or level of funding, merely legislation that would comply with its prior orders requiring that Arizona rationally fund the ELL instructional program of its choice. Intervenors' App. 156a. The District Court also declined to address a

funding issue raised by the defendants, namely, whether federal funds made available under the NCLB and other statutes could be used to meet Arizona's obligations to fund ELL instruction. Intervenors' App. 168a. Because Arizona had not enacted legislation or otherwise sought to actually rely on those funds, the District Court reasoned, a ruling on the legality of using federal funds would be an impermissible advisory opinion. *Id.* The Superintendent appealed from the sanctions order.

On March 2, 2006, the Legislature passed HB 2064, which was expressly intended to comply with the District Court's orders. Intervenors' App. 286-334a. On March 3, 2006, the Governor issued a written statement of her intent to allow the bill to become law without her signature and the State advised the District Court that legislation had been passed. (CR 373, 376.)[1]

On March 8, 2006, the Speaker of the Arizona House of Representatives and the President of the Arizona Senate (the "Intervenors") filed a motion to intervene principally to "defend the plan for English Language Learners ("ELL") adopted by the Arizona Legislature in H.B. 2064." (CR 382 at 1.) By that

---

[1] The State further requested permission to distribute the accumulated fine monies to Arizona school districts for their use in educating ELL students, rather than have them paid into the court, and the District Court granted that request. (CR 395.) The fines were subsequently vacated by the Ninth Circuit and are not at issue in this petition.

time, the Superintendent of Public Instruction had also obtained separate counsel. (CR 316, 327.)

II. House Bill 2064

HB 2064 builds on Arizona's existing system of funding the instruction of all elementary and secondary students. Since 1981, Arizona has provided most funding for elementary and secondary instruction in Arizona using a per-student funding formula applicable statewide. *See* 1981 Sess. Laws Ch. 1 § 2.

Arizona funds the maintenance and operation of its public schools through a combination of state aid and local property taxes. Pursuant to the Arizona Constitution's mandate of a "general and uniform" school system, the system of funding applies statewide and the combination of state and local funding is "equalized" to ensure that the funding provided to a school district to educate its students is not limited by the district's property wealth. ARIZ. CONST. art. XI, § 1(A); A.R.S. § 15-971.

The process for equalizing the funds available to a school district is based on the number of students actually enrolled in that district, "weighted" to take into consideration the varying costs associated with educating different students, including their grade level and the size and location of the school district. A.R.S. § 15-943 (calculating "base support level" based on weighted student count); *see also* § 15-945 (additional funds for transportation costs calculated based on the number of eligible students

transported).[2] The student count used to calculate maintenance and operations funding available is also increased to account for additional costs associated with special student needs, including whether the student is an English Language Learner (ELL). A.R.S. § 15-543(2)(b).

HB 2064, like the Arizona statutes in place since the 1980s, distributed most of the funding that it provided to meet the needs of ELLs through an increase in the weight allocated to ELL students in calculating a school's base support level (the "Group B weight"). Specifically, HB 2064 increased the Group B weight for ELL students – the extra amount of funding a school district gets for each ELL student enrolled – from $365 to $444. Intervenors' App. 319-22a (HB 2064 § 6 (amending A.R.S. § 15-943)). However, this increase was expressly contingent on an order from the District Court in this litigation finding that HB 2064 "addresses the orders in the case" and, at least on an interim basis, "permit[s the] act to be fully implemented to determine whether the resulting ELL plans and available funding to implement the plans bear a rational relationship to the cost of implementing appropriate language acquisition programs."

---

[2] School districts receive separate state and local funding for capital expenses, again based on student count but without the weighting used for maintenance and operations funding. *See* A.R.S. § 15-962; *see also* A.R.S. §§ 15-2001 through -2041 (capital facilities funding based in part on population of students using a facility).

Intervenors' App. 333-34a (HB 2064 § 15). Because the District Court has consistently found that HB 2064 is inadequate to comply with the judgment, the increased Group B weight has never taken effect.

It also provided a supplemental funding stream based on any additional costs in excess of the Group B weight amount (the "SEI Fund"). The SEI Fund is a new mechanism, created by the Legislature in HB 2064 and designed to supplement the Group B weight to the extent necessary to meet the requirement that the State's funding of ELL instruction be rationally related to the cost of whatever ELL instructional program it has chosen. If the cost of implementing the chosen, State-approved instructional model is more than the $365 or $444 per student provided through the Group B weight, then the school district may request additional monies from the SEI Fund. *Id.*

However, HB 2064 does not permit the school district to actually obtain, from the State, the entire amount of incremental ELL instructional costs that the Group B weight fails to cover. Instead, the school district must subtract from any request a percentage (based on the number of ELLs in the district) of the funds received by that district under Titles I and II of the Elementary and Secondary Education Act (ESEA), desegregation funds raised through local tax revenues, and impact aid provided to offset the presence of non-taxable lands in the school district's tax base, as well as the entire amount received by the

district under Title III of the ESEA. Intervenors' App. 284-86a (A.R.S. §15-756.01(I)).

HB 2064 also establishes a compensatory instruction fund ("CIF"); however, the use of the fund is limited. A.R.S. § 15-756.11. Under the Act, CIF monies are to be used for "programs *in addition to normal classroom instruction* that may include individual or small group instruction, extended day classes, summer school or intersession school." Intervenors' App. 306a (A.R.S. § 15-756.11(G)) (emphasis added). The programs are "limited to improving the English proficiency of current English language learners and pupils who were English language learners and who have been reclassified as English proficient within the previous two years." *Id.* No set amount will be appropriated to the fund on an annual basis, and grants from the fund are within the discretion of the Superintendent. Intervenors' App. 304-06a (A.R.S. § 15-756.11).

Group B weight monies, SEI funds, and Compensatory Instruction dollars are all available to ELL students for two years. However, HB 2064 cuts off the majority of the state monies – Group B weights and SEI funds – for any student who remains classified as an ELL for more than two years: "Monies from the [SEI] Fund established by this section and monies for the ELL support level weight prescribed in section 15-943 [Group B Weights] shall not be distributed for more than two fiscal years for the same pupil." Intervenors' App. 291a (A.R.S. § 15-756.04(C)); *see also* Intervenors' App. 321a (A.R.S. § 15-943(2)) (including

same limitation in Group B weight statute); Intervenors' App. 285-86a (A.R.S. § 15-756.01(J)) (prohibiting school districts from including in their SEI budget request the "incremental costs" of any student "who has been classified as an English language learner for more than two years").

ELL students can continue to receive Compensatory Instruction services so long as they are classified as ELL students. However, Compensatory Instruction services are specifically defined to exclude normal classroom instruction of the type ELL students presumably will receive during the first two years from the Group B weight and SEI funds. Intervenors' App. 306a (A.R.S. § 15-756.11(G)). In addition, ELL students who score at or above a designated score for English proficiency are to be reclassified as English Proficient. Intervenors' App. 293a (A.R.S. § 15-756.05(B)). English Proficient students can receive only Compensatory Instruction programs and dollars and only for two years. Intervenors' App. 306a (A.R.S. § 15-756.11(G)). The effect of these time limits is to reduce funding for ELL students who have been in ELL programs for two years to approximately $74 per ELL, based on the current discretionary appropriation for the CIF. Intervenors' App. 108a (Finding of Fact 20).

III. Procedural History After the Enactment of HB 2064

At the urging of all the parties, the District Court examined HB 2064 to determine whether it complied with that Court's prior orders and the EEOA by funding ELL instruction in Arizona in a manner rationally related to its cost. The District Court concluded that HB 2064 did not do so, addressing for the first time the use of federal funds issue on which the State and the Superintendent had previously sought the court's guidance. Because HB 2064 impermissibly relied on and considered federal funds in setting the amount of state aid for ELL instruction, and also because of the two-year limitation on most funding for ELL instruction, the District Court held that HB 2064 did not comply with the EEOA or the prior orders. Intervenors App. 186-87a. The District Court therefore also denied the Intervenors' Rule 60(b) motion to set aside the judgment. Intervenors' App. 177a.

The Superintendent and the Intervenors appealed to the Ninth Circuit, and their appeal was consolidated with the Superintendent's pending appeal from the December 2005 order granting the Plaintiffs' motion for sanctions and setting deadlines for compliance. The Ninth Circuit declined to address the substance of the District Court's rulings, instead vacating all orders appealed from and remanding for an evidentiary hearing on the petitioners' allegations of changed factual circumstances in the Nogales

Unified School District and in Arizona's school finance system. Intervenors' App. 189-90a.

After an evidentiary hearing, the District Court again concluded that Rule 60(b) relief was unavailable because of the flaws in HB 2064. Regardless of any improvements in classroom conditions that the Nogales Unified School District had made in the intervening years since the judgment, the Court reasoned, the illegality of the funding scheme chosen by the Legislature to govern future ELL instruction throughout Arizona precluded a finding of either compliance with the Court's orders or a basis to set aside those orders. Intervenors' App. 112-15a.

The District Court also made factual findings regarding the effects of HB 2064's flaws on the adequacy of the State's support for the ELL instructional programs chosen by the Legislature. Specifically, the District Court found that the Group B weight amount provided for in HB 2064, even if increased to $444 per student upon court approval,[3] was still less than the incremental costs of instruction based on the evidence presented at the hearing, thus requiring schools to look to the SEI Fund to satisfy their funding needs and thereby triggering the federal law violations associated with the calculation of amounts available to schools from that Fund. Intervenors' App. at 104-05a (Finding of Fact 10). The District Court further

---

[3] Because the District Court has not approved HB 2064, no school district actually receives $444.

found, based on testimony and evidence presented at the hearing, that the two-year limitation on Group B weight and SEI Fund monies would have a substantial impact on ELL instruction because many students need more than two years of instruction to be reclassified as English proficient. Intervenors' App. 108-09a (Findings of Fact 21-23).

The Ninth Circuit affirmed. Applying the standards articulated by this Court in *Agostini v. Felton*, 521 U.S. 203 (1997) and *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), it found that neither the underlying facts nor the governing law had changed sufficiently that the District Court abused its discretion in refusing to modify the judgment. Articulating the standard as that applicable in the absence of compliance – whether "a prior judgment is so undermined by later circumstances as to render its continued enforcement inequitable even though neither appealed nor complied with" – the Ninth Circuit examined the proffered changes of fact and law and found each insufficient to call for modification of the judgment. Intervenors' App. 60a (*Flores v. State of Arizona*, 516 F.3d 1140 (9th Cir. 2008)).

On the issues of fact, the Ninth Circuit affirmed the District Court's conclusion that the moving parties had failed to demonstrate either that the extra help needed by ELL students no longer costs extra money or that the funding scheme chosen by the Legislature as the means of meeting those costs was enough to do so, particularly in light of continued problems with student performance in the Nogales

district. Intervenors' App. 63-72a. On the issues of law, the Ninth Circuit found that NCLB neither expressly nor impliedly preempted EEOA. The Ninth Circuit found that NCLB's requirement of monitoring and gradual statewide improvement was fundamentally different from the EEOA's guarantee to each ELL child, each year, the educational support necessary to overcome language barriers. Intervenors' App. 72-81a. The Ninth Circuit concluded by examining HB 2064, noting that it does control Arizona's funding of ELL instruction now and in the future, and affirming the District Court's findings and conclusions regarding HB 2064's violations of NCLB (by considering federal funds) and the EEOA (by limiting most ELL funding to two years). Intervenors' App. 81-90a.[4]

REASONS TO DENY THE PETITIONS

I. The Unique Issues Raised by Arizona's Chosen ELL Funding Scheme Make this an Inappropriate Vehicle for Examining the Relationship Between NCLB and the EEOA.

Both petitions urge this Court to grant certiorari to resolve the question of what the EEOA requires, in light of the 2001 enactment of NCLB. They contend

[4] The Ninth Circuit declined to reach the issue of HB 2064's violation of the restriction on supplanting, which it deemed unnecessary to its decision. Intervenors' App. 88a n.53.

that, because NCLB sets out monitoring and accountability requirements for ELL instruction (as well as other aspects of the public schools), compliance with NCLB must constitute "appropriate action to overcome language barriers" under the EEOA. Intervenors' Petition at 29-33; Superintendent's Petition at 22-32.

Petitioners do not assert that there is any circuit split for this Court to resolve concerning the interplay between the NCLB and the EEOA. The question of statutory interpretation petitioners raise is resolved by the language of the NCLB, which expressly disclaims any intent to affect pre-existing laws. 20 U.S.C. § 6847 ("[n]othing in this part shall be construed in a manner inconsistent with any Federal law guaranteeing a civil right"). Both the EEOA and the NCLB relate to the instruction of ELLs, but they advance the instruction of those students through different means. NCLB conditions receipt of federal grant monies on monitoring the aggregate progress of students and fulfilling self-imposed requirements for gradual progress of those students. Intervenors' App. 263-67a (20 U.S.C. § 6842(a)(3)(A)) (requiring school to make annual increases in the percentage of children progressing toward English proficiency). The EEOA, in contrast, requires assistance for all ELL students at all times so that those students can overcome language barriers, rather than gradual progress of some percentage of ELL students, and it provides a private right of action to enforce its mandate. Superintendent's App. 196 (20 U.S.C. § 1703(f)).

Treating compliance with the NCLB as satisfying the requirements of the EEOA would be inconsistent with the guarantees of the EEOA.

This is also the wrong case to address the issue that petitioners raise concerning the NCLB and the EEOA because Arizona's current funding scheme for ELL instruction does not comply with the NCLB and puts Arizona potentially at risk of losing millions of federal educational dollars. 20 U.S.C. § 7902 prohibits a State from taking "into consideration payments under this Act (other than under Title VIII) in determining eligibility of any local educational agency (LEA) in the state for state aid, or the amount of state aid, with respect to free public education of children."[5] App. 6 (20 U.S.C. § 7902). Under HB 2064's provisions establishing the SEI Fund, the amount of state aid a school district receives is determined by taking into consideration the amount of federal educational dollars a school district receives. The statutory formula calculates state aid by determining the cost of

---

[5] The ELL instruction in grades K-12 provided by Arizona's public schools and funded by HB 2064 falls within the federal definition of "free public instruction of children" under 20 U.S.C. § 7902. *See* App. 6 (20 U.S.C. § 7801(21)) (defining "free public education" as "education that is provided – (A) at public expense, under public supervision and direction, and without tuition charge; and (B) as elementary school or secondary school education as determined under applicable State law, except that the term does not include any education provided beyond grade 12."); Intervenors' App. 286-334a (HB 2064) (providing funding for ELL instruction as part of the elementary and secondary programs of Arizona's public schools).

the program and then subtracting the amount of federal funds to determine the total amount of state aid. Intervenors' App. 284-86a (A.R.S. § 15-756.01(I)). Thus, even if compliance with NCLB were the benchmark for compliance with the EEOA, Arizona would still be out of compliance based on current facts and law, and the result in this case would remain unchanged. This case is therefore a poor vehicle for resolving the question of when a state, like Arizona, that complies with the monitoring and intervention parts of NCLB can rely on that compliance to demonstrate that it is taking "appropriate action" under the EEOA.

II. Even if the Ninth Circuit's Decision Had Conflicted with the Prior Decisions of this Court or Other Circuits, the Unique Issues Raised by Arizona's Chosen ELL Funding Scheme and the Procedural History of this Case Would Preclude Rule 60(b) Relief at this Time Under Any Available Standard.

The Intervenors also seek certiorari regarding the proper standard to be applied when a state government seeks modification of a federal court decree. They wrongly claim that the Ninth Circuit applied a standard inconsistent with that articulated by this Court and other Circuits, which they characterize variously as (1) whether continued enforcement is "detrimental to the public interest," (2) whether the decree has "proven to be unworkable," (3) whether

"the original decree could not properly have been issued on the state of facts that now exists," (4) whether there are "continuing 'violations of federal law,'" and (5) whether the "circumstances, whether of law or fact, obtaining at the time of its issuance have now changed, or new ones have since arisen." Intervenors Pet. at 22-26.

A review of the Ninth Circuit's actual decision reveals the petitioners' error. The Ninth Circuit looked to all of the factors petitioners articulate in reaching its decision, considering whether the underlying facts showed a lack of a continuing federal violation, whether the governing law had changed, and whether the State's current program of ELL instructional funding complied with federal law. Intervenors' App. at 63-90a. From that review, the Ninth Circuit concluded that despite some improvement in the performance of some ELL students, Arizona had not yet complied with the still-applicable mandate of the EEOA because of the issues raised by HB 2064, and that Rule 60(b) relief was therefore premature. On the "state of facts and law that now exist," the Ninth Circuit found that continued enforcement of the decree was appropriate. *See* Intervenors Petition at i. There is no inconsistency between the standard applied by the Ninth Circuit and that used in the prior decisions of this or other federal courts.

Moreover, no matter how flexible the standard petitioners would have this Court adopt, the petitioners do not articulate a basis for relief from a judgment

when the current law of a state is in direct violation of the federal law enforced by that judgment. This Court has been clear that "modification [under Rule 60(b)] must not create or perpetuate" a violation of federal law. *Rufo*, 502 U.S. at 391. The standards cited by the petitioners incorporate this notion, referring repeatedly to whether the facts and law existing at the time of the Rule 60(b) motion evidence ongoing violations of federal law.

To reach any issue of the proper formulation of the Rule 60(b) standard in this case, this Court would have to resolve questions concerning whether HB 2064 violates federal law, because HB 2064 controls funding for ELL instruction in Arizona. HB 2064 has been found to violate federal law in three respects.

First, HB 2064 has been found to violate the NCLB's prohibition on considering federal funds when determining the amount of state aid, as discussed above. *See* App. 6 (20 U.S.C. § 7902).

Second, HB 2064's two-year limitation on most ELL instructional funding has been found to violate the EEOA's requirement that the State take "appropriate action to overcome language barriers," because it makes no alternative provision for students who need more than two years to overcome those barriers. *See* Superintendent's App. 194 (20 U.S.C. § 1703(f)); Intervenors' App. 285-86a, 291a, 321a (A.R.S. §§ 15-756.01(J), 15-756.04(C), 15-943(2)).

Third, HB 2064 has been found to violate federal supplanting restrictions, potentially jeopardizing Arizona's entitlement to federal educational funds benefiting all students. States that receive Title I, IIA, and III funds must use them to add to ("supplement"), and not substitute for ("supplant"), the monies the State would otherwise spend on educating its students. App. 2 (20 U.S.C. §§ 6314(a)(2)(B)) (Title I school-wide programs); App. 4 (20 U.S.C. § 6315(b)(3)) (Title I targeted programs); App. 4-5 (20 U.S.C. § 6613(f)) (Title IIA grants to states); App. 5 (20 U.S.C. § 6623(b)) (Title IIA sub-grants to districts and charter schools); App. 5 (20 U.S.C. § 6825(g)) (Title III funds); *see also Indiana, Dep't of Pub. Instruction v. Bell*, 728 F.2d 938, 941 (7th Cir. 1984). A state that violates this restriction can be required to return previously received federal funds and disqualified from future grants of federal funds. App. 1 (20 U.S.C. §§ 1234c); *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 665 (1985); *Bell v. New Jersey*, 461 U.S. 773, 790-91 (1983). HB 2064 expressly reduces the amount of state aid for ELL instruction that a school district or charter school receives, dollar-for-dollar, by the full amount of the federal Title III funds and a proportional share of the other federal funds that district or school receives. *See* Intervenors' App. 284-86a (A.R.S. § 15-756.01(I)). The District Court therefore held that Arizona had also violated the prohibition on supplanting. Intervenors' App. 112-15a, 186-87a. The Ninth Circuit did not reach this issue, resting its conclusion regarding a continuing violation

of federal law on the first two federal law issues discussed above. Intervenors' App. 88a n.53.

In order to reach the question of the appropriate standard to be applied when a state government seeks relief from a federal court judgment in this case, the Court would first have to resolve whether Arizona is in fact in continuing violation of the law – notably, an issue that neither petitioner has identified as worthy of certiorari in this case. This case therefore presents an undesirable vehicle to address any issues regarding the application of Rule 60(b) that may remain after the Ninth Circuit's decision.

III. Neither the District Nor the Circuit Court Required Earmarked Funding Under 20 U.S.C. § 1703(f).

The Superintendent also urges this Court to issue a writ of certiorari to correct the Ninth Circuit's interpretation of 20 U.S.C. § 1703(f) as requiring "earmarked" ELL instructional funding. Superintendent's Petition at 8. The lower courts have imposed no such requirement – they have merely recognized that so long as Arizona chooses to fund ELL instruction from designated sources, as the Legislature did back in 1981 and again in enacting HB 2064, the funding it provides from those sources must be rationally related to the cost of ELL instruction and must meet that cost through legally-available funds. Intervenors' App. 110-11a, 115a, 150a, 177-79a.

Whether Arizona chooses to address ELL educational needs by continuing to fund ELL instruction from designated sources is up to Arizona's legislative and executive branches. That has been the method of funding all elementary and secondary education in Arizona for almost thirty years, beginning more than a decade before this lawsuit was filed and continuing through HB 2064. Nothing about the District Court's orders would preclude a change in this longstanding practice, provided that the resulting funding is rationally related to the actual cost of instructional programs and uses legally available funds. Certiorari is not needed to clarify whether the EEOA requires "earmarked" funding, because no such requirement has been read into that statute by the lower courts.

CONCLUSION

Both petitioners attempt to position this case as one involving crucial issues regarding the meaning of federal education statutes and the extent to which federal courts may intervene to enforce those statutes. The State agrees that these are important issues, but this is not the case in which this Court should address them. For six years, Arizona has struggled to reach consensus within its political branches on how to comply with the EEOA's mandate that states take "appropriate action" to enable ELL students to "overcome language barriers." A central issue in Arizona's struggle has been the extent to which the state can rely on federal funding when

calculating state aid for ELL programs. Petitioners ignore that issue in their petitions for certiorari. The Ninth Circuit and District Court decisions, however, provide guidance on that issue that should help state policymakers resolve the issues in this case. When Arizona has complied with the judgment, the State can and will seek relief under Rule 60(b).

Granting certiorari now would mire this Court in issues regarding HB 2064 and its compliance with federal law that control the outcome in this case and that would predominate over the issues actually raised by the petitions. The writ of certiorari should be denied.

Respectfully submitted,

TERRY GODDARD,
Attorney General
MARY O'GRADY,
Solicitor General
SUSAN P. SEGAL,
Assistant Attorney General
OFFICE OF THE
ATTORNEY GENERAL
1275 West Washington
Phoenix, Arizona 85007

JOSÉ A. CÁRDENAS
DAVID D. GARNER
KIMBERLY ANNE DEMARCHI
Counsel of Record
LEWIS AND ROCA LLP
40 North Central Avenue
Phoenix, Arizona 85004
(602) 262-5728

Counsel for Respondents State of Arizona and the Arizona State Board of Education

20 U.S.C. § 1234c. Remedies for existing violations

(a) Whenever the Secretary has reason to believe that any recipient of funds under any applicable program is failing to comply substantially with any requirement of law applicable to such funds, the Secretary may –

(1) withhold further payments under that program, as authorized by section 1234d of this title;

(2) issue a complaint to compel compliance through a cease and desist order of the Office, as authorized by section 1234e of this title;

(3) enter into a compliance agreement with a recipient to bring it into compliance, as authorized by section 1234f of this title;

or

(4) take any other action authorized by law with respect to the recipient.

(b) Any action, or failure to take action, by the Secretary under this section shall not preclude the Secretary from seeking a recovery of funds under section 1234a of this title.

---

20 U.S.C. § 6847. Civil Right.

Nothing in this part shall be construed in a manner inconsistent with any Federal law guaranteeing a civil right.

---

20 U.S.C. § 6314. Schoolwide Programs.

. . . .

(B) Supplemental funds

A school participating in a schoolwide program shall use funds available to carry out this section only to supplement the amount of funds that would, in the absence of funds under this part, be made available from non-Federal sources for the school, including funds needed to provide services that are required by law for children with disabilities and children with limited English proficiency.

. . . .

---

20 U.S.C. § 6315. Targeted assistance schools

. . . .

(b) Eligible Children –

(1) Eligible Population –

(A) In General – The eligible population for services under this section is –

(i) children not older than age 21 who are entitled to a free public education through grade 12; and

(ii) children who are not yet at a grade level at which the local educational agency provides a free public education.

(B) Eligible Children From Eligible Population – From the population described in subparagraph (A), eligible children are children identified by the school as failing, or most at risk of failing, to meet the State's challenging student academic achievement standards on the basis of multiple, educationally related, objective criteria established by the local educational agency and supplemented by the school, except that children from preschool through grade 2 shall be selected solely on the basis of such criteria as teacher judgment, interviews with parents, and developmentally appropriate measures.

(2) Children Included –

(A) In General – Children who are economically disadvantaged, children with disabilities, migrant children or limited English proficient children, are eligible for services under this part on the same basis as other children selected to receive services under this part.

(B) Head Start, Even Start, Or Early Reading First Children – A child who, at any time in the 2 years preceding the year for which the determination is made, participated in a Head Start, Even Start, or

Early Reading First program, or in preschool services under this title, is eligible for services under this part.

(C) Part C Children – A child who, at any time in the 2 years preceding the year for which the determination is made, received services under part C is eligible for services under this part.

(D) Neglected Or Delinquent Children – A child in a local institution for neglected or delinquent children and youth or attending a community day program for such children is eligible for services under this part.

(E) Homeless Children – A child who is homeless and attending any school served by the local educational agency is eligible for services under this part.

(3) Special Rule – Funds received under this part may not be used to provide services that are otherwise required by law to be made available to children described in paragraph (2) but may be used to coordinate or supplement such services.

. . . .

---

20 U.S.C. § 6613. State Use of Funds.

. . . .

(f) Supplement, Not Supplant – Funds received under this subpart shall be used to supplement, and

not supplant, non-Federal funds that would otherwise be used for activities authorized under this subpart.

---

20 U.S.C. § 6623. Local Use of Funds.

. . . .

(b) Supplement, Not Supplant – Funds received under this subpart shall be used to supplement, and not supplant, non-Federal funds that would otherwise be used for activities authorized under this subpart.

---

20 U.S.C. § 6825. Subgrants to Eligible Entities.

. . . .

(g) Supplement, Not Supplant – Federal funds made available under this subpart shall be used so as to supplement the level of Federal, State, and local public funds that, in the absence of such availability, would have been expended for programs for limited English proficient children and immigrant children and youth and in no case to supplant such Federal, State, and local public funds.

---

20 U.S.C. § 7801. Definitions.

Except as otherwise provided, in this Act:

. . . .

(21) Free Public Education – The term "free public education" means education that is provided

(A) at public expense, under public supervision and direction, and without tuition charge; and

(B) as elementary school or secondary school education as determined under applicable State law, except that the term does not include any education provided beyond grade 12.

. . . .

---

20 U.S.C. § 7902. Prohibition Regarding State Aid.

A State shall not take into consideration payments under this Act (other than under title VIII) in determining the eligibility of any local educational agency in that State for State aid, or the amount of State aid, with respect to free public education of children.

OPPOSITION BRIEF

113 (4) (5)

Nos. 08-289 and 08-294

Supreme Court, U.S.
FILED
DEC 1 - 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT OF PUBLIC INSTRUCTION IN THE STATE OF ARIZONA,

Petitioner,

V.

MIRIAM FLORES, ET AL.,

Respondents.

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES and PRESIDENT OF THE ARIZONA SENATE,

Petitioners,

V.

MIRIAM FLORES, ET AL.,

Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

COMBINED BRIEF IN OPPOSITION BY RESPONDENTS

TIMOTHY M. HOGAN
Counsel of Record
JOY E. HERR-CARDILLO
ARIZONA CENTER FOR LAW IN THE PUBLIC INTEREST
202 E. McDowell Rd.
Phoenix, Arizona 85004
(602)258-8850

Counsel for Respondents

QUESTIONS PRESENTED

On January 24, 2000, the district court held that under the school finance system crafted by the State, Arizona's funding for English Language Learner (ELL) programs violated the Equal Education Opportunities Act (EEOA) because it was arbitrary and failed to provide school districts with the resources necessary to help their students overcome language barriers. Although Governor Jane Hull and Superintendant Lisa Graham Keegan decided not to appeal the judgment, for the next seven years, the Arizona legislature resisted complying with it. This contumacy forced the district court to issue multiple orders establishing deadlines for compliance. When the State failed repeatedly to meet the deadlines, the court threatened to impose monetary sanctions. At that point, two of the State's legislative leaders intervened to seek relief from the unappealed judgment. After an eight day evidentiary hearing, the court held that neither the law nor facts had changed in a manner that justified modification of the original judgment, which remained unsatisfied.

The questions presented are:

1. Whether given the above history, it is appropriate or necessary for this Court to review whether the Petitioners were entitled to relief under Rule 60(b)(5) where both lower courts applied the standard articulated by this Court?

2. Whether this Court should review the Court of Appeal's holding that the No Child Left Behind Act does not excuse the State's obligations under the EEOA, a holding that does not conflict with a decision of any other circuit court and is consistent with the legislative purposes of both statutes.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

A. The District Court's Judgment and Post-Judgment Orders. 2

1. Plaintiffs' Initial Requests for Post-Judgment Relief 4

2. Interim Legislation and The Cost Study 7

3. The January 2005 Order Establishes a Deadline. 8

4. Plaintiffs' Motion for Sanctions and Injunctive Relief. 10

B. HB 2064 11

1. The District Court's First Order Holding that HB 2064 Did Not Satisfy the Judgment. 13

2. Appeal and Remand 14

REASONS FOR DENYING THE PETITIONS 16

A. The Ninth Circuit's Statement and Application of the Standards for Rule 60(b)(5) Relief Do Not Conflict With the Decisions of Any Other Circuit and Are Consistent with This Court's Precedent. 16

B. The Lower Courts' Determination that the NCLB Reinforces—and Does Not Diminish—a State's Obligation Under the EEOA to Provide Adequate Funding for ELL Programs Is Not In Conflict With Any Decision of This Court or Any Other Circuit Court, and Is Consistent with the Legislative Purposes of Both Statutory Schemes.....22

C. Neither the District Court Nor the Court of Appeals Usurped the State's Discretion to Determine How to Comply with the Judgment and the EEOA.....27

CONCLUSION.....30

TABLE OF AUTHORITIES

CASES

ACORN v. NY City Dept. of Educ., 269 F. Supp. 2d 338 (S.D. N.Y. 2003) 26

Agostini v. Felton, 521 U.S. 203 (1997) 16, 17

Alexander v. Britt, 89 F. 3d 194 (4th Cir. 1996) 21

Blanchard v. Morton Sch. Dist., 2006 U.S. Dist. LEXIS 59417, 2006 WL 2459167 (W.D. Wash. Aug. 25, 2006) 26

Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981) 22, 23

Clark v. Coye, 60 F.3d 600 (9th Cir. 1995) 17

Coachella Valley Unified Sch. Dist. v. California, 2005 U.S. Dist. LEXIS 44825, 2005 WL 1869499 (N.D. Cal. Aug. 5, 2005) 26

Debra P. v. Turlington, 564 F. Supp. 177 (M.D. Fla. 1983) 23

Evans v. City of Chicago, 10 F. 3d 474 (7th Cir. 1993) 21

Flores v. Arizona, 160 F. Supp. 2d 1043 (D. Ariz. 2000) 4, 5, 6

Flores v. State of Arizona, 172 F. Supp. 2d 1238 (D. Ariz. 2000) 2, 3

Fresh Start Academy v. Toledo Bd. of Educ., 363 F. Supp. 2d 910 (N.D. Ohio 2005) 26

Gomez v. Illinois State Board of Education, 811 F.2d 1030 (7th Cir. 1987) 23

Hook v. Arizona Dep't of Corr., 107 F.3d 1397 (9th Cir. 1997) 16

Keyes v. School District No. 1, Denver, Colorado, 576 F. Supp. 1503 (D. Colo. 1983) 23

Reynolds v. McInnes 338 F.3d 1221 (11th Cir. 2003) 18

Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992) 17, 18

Stokes v. United States Dept. of Educ., 2006 U.S. Dist. LEXIS 46838, 2006 WL 1892242 (D. Mass. July 10, 2006) 26

Teresa P. v. Berkeley Unified School Dist., 724 F. Supp. 698 (N. D. Cal. 1989) 23

United States v. City of Miami, 2 F.3d 1497 (11th Cir. 1993) 18

STATUTES

20 U.S.C. § 1703(f) 22, 26

20 U.S.C. § 1706 26

20 U.S.C. § 6825(g) 24

20 U.S.C. § 6845 27

20 U.S.C. § 6847 27

Ariz. Rev. Stat. § 15-756.01(I) 12

Ariz. Rev. Stat. §15-756.01(C) 12

Ariz. Rev. Stat. §15-943 28

HB2064, Sec. 13, 47th Leg., 2d Reg. Sess. (Ariz. 2006) 12, 13

OTHER AUTHORITIES

October 2, 2008 United State Department of Education Guidance 25

RULES

Fed. R. Civ. P. 60(b)(5) ..... passim

Miriam Flores et al., Plaintiffs below, respectfully oppose the petitions for a writ of certiorari to review the judgment below of the United States Court of Appeals for the Ninth Circuit.[1]

The characterization of this case as "a serious threat to the ability of local officials across the country to deal creatively (and effectively) with their own local educational challenges" is completely false. L.I. Pet. at 2. As the Court of Appeals recognized below, since 2000 the principal issue has been the State's failure to comply with the judgment by adequately funding ELL education. The assertions by the Petitioners that the district court has involved itself in education policy decisions in Arizona and has had an "eight year reign" over Arizona schools are misrepresentation of fact. *Id.* The schools are not even before the court; moreover, as detailed below, the district court has not entered a single order that has required *them* to do anything. Every remedial order has been directed to the State Defendants and has related to the State's funding obligation. Throughout the history of this case, the district court has demonstrated extreme deference to the legislature and has at all times recognized that it is that body's responsibility to determine how it wants to meet its federal obligation to adequately fund ELL education.

The Petitioners' claim that the Court of Appeals failed to give appropriate deference to federal

---

[1] Citations to the Petitions are designated as "Sup. Pet." for the Petition for Certiorari filed by Thomas C. Horne, the Superintendent of Public Instruction, and "L.I. Pet" for the Petition for Certiorari filed by the President of the Arizona Senate and Speaker of the Arizona House of Representatives, the Legislative Intervenors below.

policy judgments in the No Child Left Behind Act (NCLB) is likewise misguided. In their effort to avoid the State's obligation to adequately fund ELL programs, the Petitioners confuse the NCLB, which is voluntary, with the EEOA which establishes a state's mandatory obligation to ELL students.

Instead of recognizing the authority of the federal court and honoring the State's obligations under the EEOA, the Arizona Legislature has spent the past eight years resisting compliance with the district court's lawful order. In prodding the State toward compliance, the district court has repeatedly shown both deference and patience. As the Court of Appeals properly held, the Petitioners have failed to demonstrate any change in the facts or the law that would justify excusing the State from complying with the judgment. The Rule 60(b)(5) motion was properly denied and review of the decision by this Court is unwarranted.

STATEMENT OF THE CASE

Although this case was commenced in 1992, the events leading to the present petitions all occurred after the district court entered its Judgment.

A. The District Court's Judgment and Post-Judgment Orders.

On January 24, 2000, the district court held that under the school finance system crafted by the State legislature, Arizona's funding for ELL programs violated the EEOA because the additional amount allocated for ELL students under the State's weighted system ($150 per ELL student) bore no relation to the actual cost of educating those students and was inadequate, resulting in multiple program deficiencies. *Flores v. State of Arizona,* 172 F. Supp. 2d 1225, 1238 (D. Ariz. 2000).

The weighing factor for ELL students (also known as "Group B weight") was not devised by the district court but was part of the existing finance system at the time of judgment. It had been put in place in 1990 by the State legislature and was based on a cost study performed in 1987-88, which showed that on the average school districts were spending an additional $450 per ELL student. *Id.* at 1228.

Ten years later, the district court found the funding both arbitrary and inadequate. The State Defendants did not appeal the judgment. At the time that this decision was made, the Governor of the State was Jane D. Hull, a Republican, and the State Superintendent of Public Instruction was Lisa Graham-Keegan, also a Republican. The Attorney General was Janet Napolitano, a Democrat.

When, over the next seven years, the State failed to comply with the judgment by adequately funding ELL programs, the district court issued a series of remedial orders directed at the State and designed to promote compliance. These orders have consistently deferred to the State's prerogative to determine how it will fund ELL education and have only required generally that the State fund whatever ELL programs it adopts based upon the cost of implementing them. The district court has never required "earmarked" funding for ELL students or mandated any specific amount of funding. Because the Petitioners have so grossly mischaracterized the district court's actions in this case—actions that in fact demonstrate the district court's careful exercise of its discretion—a detailed summary of these events follows.

1. Plaintiffs' Initial Requests for Post-Judgment Relief

During the trial leading up to the judgment, the Defendants had informed the court that the Arizona legislature had established a legislative committee to conduct a cost study to determine the amount of funding provided by the state and federal governments for English instruction of ELL students and the amount of money being spent by schools to educate those students. *Flores v. Arizona,* 160 F. Supp. 2d 1043, 1044 (D. Ariz. 2000). That committee was required to submit a report that contained funding recommendations by December 1, 1999, more than a month before the judgment issued. Although the report was submitted timely, it failed to contain any recommendations on funding. *Id.* at 1045.

In view of the committee's failure to act as required by its own law, on February 11, 2000 Plaintiffs' counsel sent letters to members of both the Arizona House of Representatives and the Arizona State Senate informing them of the court's judgment that the State was in violation of the EEOA and asking legislators to take action in response to the court's ruling by performing a cost study to establish a minimum funding level for ELL programs. *Id.* No response was received to the letters and in April 2000, the legislature adjourned without taking any action to address the court's judgment. *Id.*

In June 2000, Governor Hull called a special legislative session on education funding but excluded ELL programs from the list of permissible items to be funded by a proposed state sales tax. *Id.* It was then that the Plaintiffs filed their first motion for

post-judgment relief on July 13, 2000. CR 203.[2] In that Motion, they requested that the court order the State to perform the cost study that it had advised the court it was going to perform—but had failed to even begin—prior to the next regularly scheduled legislative session which would convene in January 2001. *Id.*

The State resisted the Plaintiffs' motion, claiming that it was unrealistic to conduct a cost study prior to the next legislative session because, among other things, there was a proposition (Proposition 203) on the November ballot which, if passed by the voters, would repeal the existing bilingual education statutes and adopt sheltered English immersion as the State's educational methodology for ELL students. The State proposed instead that a cost study be completed within two years and suggested that the court schedule periodic status conferences to monitor the State's progress. CR 207.

In October 2000 the court rejected the Defendants' suggestion "to continue to delay appropriating adequate funding for [ELL] programs in Arizona" and described their argument that a cost assessment could not be done until after the vote on Proposition 203 as "brazen." 160 F. Supp. 2d at 1045-46. The court noted that it had made 64 specific findings of fact and not one had criticized the models being used to teach ELL students in Arizona. *Id.* at 1046. The inadequacies found by the court related to funding

---

[2] Citations to the Record are to the district court docket and are designated as "CR" (Court Record) followed by the docket number.

and existed regardless of what methodology was used. *Id.*

Even so, the court recognized that the equitable relief that had been requested by the Plaintiffs "encroaches on a domain that primarily belongs to local government institutions, including the State's legislature." *Id.* at 1047. "Therefore, the Court exercises its equitable power conscientiously and takes every step to allow State authorities, whose powers are plenary, to decide how to provide [ELL] students with a meaningful [ELL] program." *Id.* Nevertheless, the court determined that it "must grant Plaintiffs' requested relief because without judicial action, the federal law violations. . .will continue for at least another three years." *Id.*

The court ordered that a cost study be prepared in a timely fashion so that the Arizona legislature could appropriate funding during the upcoming legislative session beginning in January 2001. The resulting cost study, however, was not submitted to the Arizona legislature until May 7, 2001. Three days later, the legislature adjourned without taking any action to appropriate adequate funding for language acquisition programs.

At this point, two legislative sessions had gone by since the judgment was issued without any action to comply with the judgment. As a result, the Plaintiffs returned to court on May 22, 2001 and asked that the district court establish a deadline for compliance with the judgment. CR 217. Despite the Defendants' request for a further delay, the judge granted the Plaintiffs' motion and ordered the State to comply by January 31, 2002 or at the conclusion of any earlier convened special session. CR 226.

2. Interim Legislation and The Cost Study.

In late 2001, a special session of the Arizona legislature was convened to consider addressing the issues in this case. The result was interim legislation designed to provide temporary funding for ELL programs while the legislature conducted yet another, more comprehensive, cost study. The legislation contained three elements. First, it increased the per student funding level for ELLs from $150 to $331. Second, it created three additional pools of funding for teacher training, compensatory instruction and instructional materials that were scheduled to lapse after three years. Third, the legislation authorized a comprehensive cost study to evaluate the costs of providing ELL instruction. The legislature gave itself until August 2004 to complete the cost study and have it evaluated by a joint legislative committee which would then make recommendations for consideration by the legislature at the legislative session convened in January 2005.

The Plaintiffs vigorously opposed this legislation as a stopgap measure that would only cause further delay. CR 234. The new funding level for ELLs was based on the amount that the Nogales Unified School District was actually spending on ELL programs, even though that was the very program that the court had held to be deficient and no effort had ever been made to determine whether that amount was sufficient. *Id.* Although the district court agreed that the new amount appropriated was as arbitrary as the original amount, it ultimately approved the legislation as an interim measure over the Plaintiffs' objections because at least the new funding level was related to something, however

misguided, and the legislative plan for a comprehensive cost study would provide the basis for making appropriate funding adjustments in the future. CR 257.

As the 2004 deadline for submitting the cost study approached, it became clear that the legislature did not like the preliminary results being reported and it began efforts to discredit the study it had commissioned. As a result of these attacks, instead of submitting the full study that was required by the legislation, the National Conference of State Legislatures ("NCSL"), the author of the study, submitted an Executive Summary which indicated. that funding for ELL programs needed to be increased by more than $1,000 per student CR 289.

With only an Executive Summary submitted by the NCSL, the legislative committee that had been established to evaluate the cost study failed to meet. Instead, its chairmen informed the Governor that without a cost study, there was nothing for the committee to do. CR 285, Exhibit A.

3. The January 2005 Order Establishes a Deadline.

With the January 2005 legislative session about to begin and with no recommendations from the legislative committee, the Plaintiffs returned to court and sought an order that would establish a deadline for compliance with the judgment at the end of the 2005 legislative session. CR 224. On January 28, 2005, the district court granted the Plaintiffs' motion observing that "the legislature has failed to meet the Court's deadlines as well as [its] own." CR 290 at 5. The Defendants were ordered to comply with the judgment by "appropriately and

constitutionally funding the State's ELL programs taking into account the Court's previous orders and the parties' stipulation." *Id.*

Despite this order, it was not until the penultimate day of the legislative session, May 12, 2005, that legislation was even introduced to address the district court's judgment. The legislation introduced, however, fell far short of complying with the judgment. Its principal defect was that it failed to provide funding based upon any known costs of delivering English acquisition programs. CR 296 at 3. Instead, the legislation provided an arbitrary funding increase of approximately $75 per ELL student for one year. After that, future funding was contingent upon the development of what the legislation called "research-based models."

The legislation was rushed through the legislative process in less than a day and the bill was transmitted to Governor Napolitano[3] who vetoed it on May 20, 2005.

As a result of the Governor's veto, the Defendants were in violation of the district court's January 28, 2005 order requiring compliance by the end of the legislative session. However, in the Governor's veto message, she invited the legislature to promptly work to achieve a bipartisan bill that "meaningfully addresses the Court's legitimate concerns." CR 296, Exhibit 1 at 2.

---

[3] Governor Napolitano succeeded Governor Hull in 2002. Mr. Horne was also elected Superintendent of Public Instruction in 2002.

The Plaintiffs waited to assess the legislative response to the Governor's invitation but none was forthcoming. CR 296 at 4. With the temporary funding enacted under the earlier legislation expiring on July 1, 2005, the Plaintiffs had no choice but to pursue sanctions against the State. *Id.*

4. Plaintiffs' Motion for Sanctions and Injunctive Relief.

On August 2, 2005, the Plaintiffs filed their Motion for Sanctions citing the State's indifference and outright legislative resistance to compliance. The Plaintiffs' Motion asked the court to terminate federal highway funding to the State or, alternatively, to impose fines for its continued failure to comply. On December 15, 2005, the district court granted the Plaintiffs' motion. CR 335. It rejected the Plaintiffs' proposal to enjoin the receipt of federal highway funds but approved an escalating schedule of fines designated to begin fifteen days after the beginning of the 2006 legislative session if the Defendants had not complied with the judgment by that time. CR 235 at 13-14.

Despite the district court's Order, no legislation was enacted to address this case within the first fifteen days of the 2006 legislative session so the fines began to be assessed on January 25, 2006. The legislature finally reacted by twice passing legislation similar to the 2005 legislation that had been vetoed by the Governor. Both bills were vetoed. Finally, the legislature removed a corporate tuition tax credit from the bill and the Governor decided to allow the legislation, HB 2064, to become law without her signature; she made it clear, however, that she did not believe the legislation satisfied the judgment. CR 376, Exhibits A, B.

By the time all was said and done, the State had incurred $21 million in fines. [4]

B. HB 2064

Shortly after HB 2064 was passed, the Speaker of the Arizona House of Representatives and the President of the Arizona Senate requested Leave to Report to the Court the Adoption of House Bill 2064. CR 373. The State also filed a motion requesting expedited consideration of the bill. CR 374; 375. A few days later, the Speaker and President filed a Motion seeking to Intervene as Defendants along with a Motion to Purge the State of contempt and to dissolve the injunction. CR 382. The Motion to Intervene was granted and the parties were instructed by the district court to submit briefs on whether HB 2064 satisfied the judgment. CR 390. The Petitioners both took the position that the bill satisfied the judgment. CR 382, 414, 434. The Plaintiffs, the State of Arizona and State Board of Education, all took the position that the bill was fatally flawed and the judgment remained unsatisfied. CR 415, 419.

As noted above, HB 2064 was basically the same legislation that the Governor had vetoed over a year earlier on May 13, 2005. It provided almost exactly the same amount of funding for ELL programs as the previous legislation. Retaining the formulaic funding used by the State, it increased the Group B weight—the additional amount allocated to cover the costs of educating ELL students—from

---

[4] The fines were subsequently vacated by the Ninth Circuit Court of Appeals when it remanded the matter to the district court for an evidentiary hearing (see *infra*).

approximately $355 per ELL student to $432 per ELL student, or an increase of $77 per student. HB2064, Sec. 13, 47th Leg., 2d Reg. Sess. (Ariz. 2006) . This small funding increase in the Group B weight, however, was deceptive because it also included a new two year limitation on receipt of Group B weight funds for each ELL student. Because most ELL students take more than two years to become proficient, the so-called funding increase actually represented a significant funding decrease for districts with large ELL populations.

The legislation also established an Arizona English Language Learners Task Force ("Task Force") to develop and adopt research-based models of structured English immersion programs for use by school districts and charter schools. HB 2064, Sec. 4, (adding Ariz. Rev. Stat. §15-756.01(C)). In addition to developing "models," the Task Force was also charged with establishing a form for school districts and charter schools to request additional funding for the models. HB 2064, Sec. 4, (adding Ariz. Rev. Stat. § 15-756.01(I)). However, the legislation specified that school districts could only apply for additional funding after offsetting: 1) Title I and II funds received for students who are also ELL students; 2) all Title III funds received; 3) any federal impact funds received for students who are also ELL students; 4) a portion of any desegregation funds received (based on the percentage of students who are ELLs); and 5) the Group B weight funds received. *Id.* Further, as noted earlier, the legislation prohibited school districts and charter schools from including the costs of any student who has been classified as an English language learner for more than two years in the budget request. *Id.*

1. The District Court's First Order Holding that HB 2064 Did Not Satisfy the Judgment.

On April 26, 2006, the district court determined that HB 2064 failed to satisfy the judgment in this case and also failed to comply with federal law. CR 448. The court acknowledged that the landscape with regard to ELL programming had changed since judgment was entered in the case and that some progress had been made in the Nogales Unified School District with regard to improved academic success for some elementary and junior high school students. *Id.* at 2-3. But, the district court noted, the EEOA had not changed and it still required the State to provide funding for ELL students that is not arbitrary and capricious. *Id.* at 3. Additionally, the court determined that it is still the law that a state may not consider the use of federal funds to determine the eligibility of a school district or charter school for state funding or the amount of any state aid. *Id.* Finally, the court held that the NCLB did not supersede the State's duty to properly fund ELL programs. *Id.*

More fundamentally, the court determined that the cost of implementing ELL programs had not been established by the legislation. CR 448 at 4. The legislation failed to establish minimum standards for providing funding as required by the judgment, making it impossible for the court to determine whether the funding was rational or adequate. *Id.* Therefore, the court could not determine if the $77 increase bore any relationship to the actual cost of the ELL programs or if it adequately funded them.

The court held that because federal funds are to supplement, not supplant, state funds for educa-

tion and the legislation required school districts to use federal funding to finance a state obligation, it violated federal law. *Id.* at 5. The district court also determined that the legislation's attempt to redirect locally generated desegregation funding for ELL purposes was unlawful. *Id.* at 6. Finally, the district court determined that the legislation's two-year limitation on funding for ELL students violated the EEOA. The court held that the EEOA does not impose a time limitation and the State's funding obligation is a continuing one until students have overcome language barriers that impede their participation. *Id.* at 7-8. Thus, while a two-year period for becoming English proficient might be a laudable goal, terminating funding after two years whether or not proficiency had been achieved was unlawful. *Id.*

Although the district court held that the legislation failed to satisfy the judgment and the court's subsequent remedial orders and violated federal law, it did not invalidate the legislation but simply referred the parties back to the court's December 16, 2005 order which directed the State to comply with the judgment. *Id.* at 8.

2. Appeal and Remand

The Petitioners appealed the Court's April 26, 2006 Order and on August 23, 2006, in a Memorandum Decision, the Ninth Circuit Court of Appeals ruled that the district court "should have held an evidentiary hearing and made findings of fact regarding whether changed circumstances required modification of the original order or otherwise had a bearing on the appropriate remedy." Memorandum at 7. The Court of Appeals vacated the April 25, 2006 order rejecting HB 2064 and remanded the case to the district court. *Id.*

In January 2007, the district court held an eight day evidentiary hearing. Without exception, all of the data offered by Plaintiffs at the hearing proved that State funding for ELL programs is a fraction of what it should be.

On March 22, 2007 the district court issued its ruling which included Findings of Fact and Conclusions of Law. CR 638. The district court denied the Legislative-Intervenors' Rule 60(b)(5) Motion for Relief from the judgment. It held that neither the changes in education funding nor HB 2064 satisfied the judgment and further found, as it had previously, that HB 2064 violated federal law in multiple respects. The district court ordered the State to comply with the judgment by the end of the 2007 legislative session. *Id.* That is the Order that is the subject of the Petitioners' appeals.[5]

---

[5] As the Court of Appeals noted in its Opinion, there have been further proceedings before the district court. Sup. Pet. at App. 91. On November 21, 2008, the district court concluded an 11 day evidentiary hearing regarding the sufficiency of the State's 2008 appropriation to fund the models adopted pursuant to HB 2064. The parties are scheduled to submit post-hearing briefs and proposed findings of fact and conclusions of law by the end of January 2009. CR854.

REASONS FOR DENYING THE PETITIONS

A. The Ninth Circuit's Statement and Application of the Standards for Rule 60(b)(5) Relief Do Not Conflict With the Decisions of Any Other Circuit and Are Consistent with This Court's Precedent.

The Legislative Petitioners' argument that the Court of Appeals applied incorrect law when it reviewed the district court's denial of their 60(b)(5) motion misrepresents both current law and the actions of the lower court.

First, the Legislative Petitioners suggest that the Court of Appeals applied an improper standard of review. L.I. Pet. at 18 ("Instead of determining whether the district court's orders were appropriate in view of dramatic changes in federal requirements, the court of appeals applied a highly deferential standard of review.") Not so. The "abuse of discretion" standard of review used by the Court of Appeals to review the district court's decision is the standard that this Court has held should be used when reviewing the denial of a Rule 60(b)(5) motion. *Agostini v. Felton*, 521 U.S. 203, 238 (1997). Moreover, the Court of Appeals acknowledged that even under this standard of review, its "review is somewhat closer in the context of institutional injunctions against States 'due to federalism concerns' implicated by such injunctions." Opinion, reprinted at Sup. Pet., App. 1, at App. 52[6] quoting *Hook v. Arizona Dep't of Corr.*, 107 F.3d 1397, 1402 (9th Cir. 1997).

---

[6] Citations to the Court of Appeals' opinion are to the copy of the opinion in the Appendix to the Superintendent's Petition.

Thus, the Court of Appeals explained, "[i]n such contexts, '[w]e scrutinize the injunction closely to make sure that the remedy protects the Plaintiffs' federal constitutional and statutory rights but does not require more of state officials than is necessary to assure their compliance with federal law.'" Opinion, Sup. Pet. at App. 52 quoting *Clark v. Coye*, 60 F.3d 600, 604 (9th Cir. 1995). Consequently, when it reviewed the district court's action, the Court of Appeals undertook an independent and exhaustive examination of the factual record and, in its 90-page opinion, addressed in detail each and every argument advanced by the Petitioners. The accusation that the appellate court was improperly deferential to the district court is simply not supported by the law or the facts.

Second, the Petitioners' attempt to create controversy over the Court of Appeals' articulation of the requirements to obtain relief under Rule 60(b)(5) does not hold up under scrutiny. From the outset of its analysis, the Court of Appeals cited the seminal cases from this Court that establish the framework for determining when relief is appropriate in institutional reform cases. Opinion, Sup. Pet. at App.49 citing *Agostini v. Felton*, 521 U.S. 203, 215 (1997) and *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992). The Court of Appeals properly observed that *Rufo* sets forth a general, flexible standard for all petitions brought under the equity provision of Rule 60(b)(5) and that it is appropriate to grant relief when the party seeking relief meets its initial burden by showing "a significant change either in factual conditions or in law." *Id.* quoting *Agostini*, 521 U.S. at 215. The Court of Appeals further held that once that showing is made, modification of the judgment may be warranted if changed

facts make compliance more onerous or enforcement of the decree without modification detrimental to the public interest. *Id.* Finally, the appellate court noted that modification is necessary if a consent decree or injunction "'become[s] impermissible under federal law.'" *Id.* quoting *Rufo*, 502 U.S. at 388.

The contention that the standard articulated by this Court and applied by the Ninth Circuit Court of Appeals in this case was different or more rigid than the standards applied by other circuit courts is simply not true. The various circuit cases cited by the Legislative Petitioners apply the same rule applied in this case. For example, the Petitioners assert that the Eleventh Circuit has stated that compliance with technical terms of a decree is not required and that in evaluating a request for modification the court must look at the basic purpose of the decree. L.I. Pet. at 23 citing *Reynolds v. McInnes* 338 F.3d 1221, 1226 (11th Cir. 2003). Yet, as the *Reynolds* court noted, "[i]f the provision that a party seeks to modify 'is central to the decree, or . . . 'the most important element' of the decree, then the modification is likely to violate the basic purpose of the decree and, therefore, will be forbidden.'" 338 F. 3d at 1226 *quoting United States v. City of Miami,* 2 F.3d 1497, 1504-05 (11th Cir. 1993).

That is precisely what the Ninth Circuit did in this case. What the Legislative Petitioners fail to acknowledge is that, unlike the Defendants in *Reynolds* who sought to modify only one of twenty-one articles in a consent decree, the "modification"[7] they

---

[7] In fact, the Legislative Petitioners did not seek to modify the judgment but rather sought to be either excused from

(continued on following page)

sought in this case did, in fact, go to the core of the original judgment. As the Court of Appeals explained, the basic premise of the original judgment was that the State's failure to set a minimum base funding level per ELL student that was both adequate and rationally related to costs was a violation of the EEOA. Opinion, Sup. Pet. at App. 61-62. "[F]or eight years the parties have litigated based on that premise." *Id.* at App. 69. Continuing to demand that the State take action to comply with that requirement of the judgment "does not miss the forest for the trees. It cuts to the heart of this case, which has been about such funding since 2000...." *Id.* Further, as the Court of Appeals noted,

> Nor have the fundamentals of the Arizona school funding system changed in any way that undermines the district court's original conclusion that incremental ELL funding is what matters for EEOA purposes. Accepting the Superintendent and Legislative Intervenors' argument would be to hold that the funding restrictions and categories used by Arizona are meaningless. As we have explained, Arizona allocates ELL funding *on top* of base level support. HB 2010 and HB 2064 have followed this approach. This statutory scheme is still premised on the idea that ELL programming imposes costs *additional* to those covered by ordinary base level funding. (emphasis in original.)

---

complying with it altogether or to be deemed to have satisfied it. CR422.

Id. at App. 69-70. Thus, the Petitioners' request to be excused from providing minimum base level funding for ELL students that was both adequate and not arbitrary went to the very core of the original judgment.

The Legislative Petitioners argue that the unappealed judgment was the equivalent of a consent decree and that this fact caused the Court of Appeals to apply an inappropriate standard under Rule 60(b)(5). L.I Pet. at 22. The actual analysis of the Court of Appeals, however, contradicts this contention. At the outset of its discussion of whether the Petitioners were entitled to relief under Rule 60(b)(5), the court observed that although this case was unusual because neither the original judgment, nor the earlier post-judgment orders had been appealed, it nonetheless acknowledged that "there are some instances, likely rare, in which a prior judgment is so undermined by later circumstances as to render its continued enforcement inequitable even though neither appealed nor complied with." Opinion, Sup. Pet. at App. 60-61. The fact that this case did not present one of those instances had nothing to do with the failure to appeal the original judgment. Rather, after a thorough review of the evidence and discussion of the the legal arguments raised by Petitioners, the Court of Appeals determined that "just as no changes in fact have eliminated the premises of the Declaratory Judgment, no changes in law have done so either." *Id.* at App. 82.

The court then considered the Petitioners' claim that the recently enacted legislation, HB 2064, satisfied the judgment. Like the district court before it, the Court of Appeals found that the provisions of HB 2064 did not constitute compliance because the two year funding cut off was arbitrary; the increase

in Group B weight was inadequate; and the reliance upon federal funds in calculating state aid violated federal law. *Id.* at App. 85-87. Thus, because the judgment remained unsatisfied and the State continues to violate the EEOA, the Court of Appeals concluded "it is not inequitable to continue to require compliance." *Id.* at App. 92.

Contrary to the Legislative Petitioners' assertion that "the Ninth Circuit's decision cannot be squared with decisions of other courts of appeals holding that under a court-imposed injunction, a party 'can only be required to address ongoing illegal activity or the past effects of illegal activity" –that is, continuing "violations of substantive federal law," the court's opinion is completely consistent with the authorities cited from other circuits. L.I. Pet. at 24 quoting *Alexander v. Britt,* 89 F. 3d 194, 199-200 (4th Cir. 1996) In concluding that the district court did not abuse its discretion in denying the Rule 60(b)(5) motion, the Court of Appeals determined that the State had not only failed to comply with the original Declaratory Judgment but also confirmed that the State's failure constituted a continuing violation of federal law. *See, e.g. Evans v. City of Chicago,* 10 F. 3d 474, 477-79 (7th Cir. 1993)(there must be a "substantial federal claim, not only when the decree is entered but also when it is enforced.").

In sum, both the district court and the Court of Appeals applied the correct standard in deciding the Petitioners' Rule 60(b)(5) Motion. The Motion was denied because the Petitioners failed to demonstrate that there was a change in either the facts or law that would make enforcement of the judgment inequitable. Review by this Court of that lengthy and fact-specific determination is unwarranted.

B. The Lower Courts' Determination that the NCLB Reinforces—and Does Not Diminish—a State's Obligation Under the EEOA to Provide Adequate Funding for ELL Programs Is Not In Conflict With Any Decision of This Court or Any Other Circuit Court, and Is Consistent with the Legislative Purposes of Both Statutory Schemes.

In rejecting the Petitioners' argument that compliance with the NCLB excused their obligation to adequately fund ELL programs under the EEOA, the Court of Appeals properly recognized the different, albeit complementary, purposes of the two statutory schemes.

The relevant provision of the EEOA provides that:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by - -
>
> (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

20 U.S.C. § 1703(f). Because Congress failed to define what constitutes "appropriate action" under the EEOA, it has been left to the courts to interpret.

In *Castaneda v. Pickard*, the Fifth Circuit Court of Appeals developed a three-prong test for determining compliance with the EEOA. *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981). First, the State must adopt a recognized methodology for delivering English acquisition services to ELLs. (As

noted above, the Plaintiffs have never contested the State's methodology in this case. English immersion was adopted by Arizona voters over eight years ago and all of the cost data generated since then has been based on that methodology.) Second, the State must devote the necessary resources to transform the methodology into reality. (That has been the problem in this case.) And, third, the program must produce results indicating that language barriers confronting students are actually being overcome. *Castaneda,* 648 F.2d at 1009-1010. This three-step analysis has been adopted by courts as the principal test for determining what constitutes "appropriate action" under the EEOA. *See, e.g. Gomez v. Illinois State Board of Education,* 811 F.2d 1030 (7th Cir. 1987); *Teresa P. v. Berkeley Unified School Dist.*, 724 F. Supp. 698 (N. D. Cal. 1989); *Keyes v. School District No. 1, Denver, Colorado,* 576 F. Supp. 1503 (D. Colo. 1983); *Debra P. v. Turlington,* 564 F. Supp. 177 (M.D. Fla. 1983).

In this case, the district court applied the *Castenada* test and concluded that the State had failed to satisfy the second part:

> Defendants are violating the EEOA because the State has failed to take appropriate action to remedy language barriers in NUSD, in that, despite the adoption of a recognized [ELL] program in NUSD, the State has failed to follow through with practices, resources and personnel necessary to transform theory into reality.

172 F. Supp.2d at 1239. The district court squarely placed the responsibility for adequately funding ELL programs on the State. Nothing happened in the last

eight years that would render the analytical framework set forth in the district court's judgment outmoded. It remains the applicable law binding on the State.

The Petitioners' suggestion that the NCLB somehow renders the EEOA and *Castaneda* obsolete has absolutely no merit. In claiming that the NCLB fills the "gap" recognized in *Castaneda* (L.I. Pet, at 32) the Petitioners not only confuse the very different purposes of the two statutes, as the Court of Appeals recognized, but also ignore the fact that unlike the "appropriate action" requirement of the EEOA, any "detailed requirements" imposed by the NCLB are only applicable if a State elects to receive federal funding. As Petitioners' themselves acknowledge, Arizona can "opt out" of the NCLB and forego federal education funding. L.I. Pet. at 10. The State, however, cannot "opt out" of the EEOA. Thus, although Arizona has the option of electing to avoid the requirements of the NCLB and forego federal funding, if it were to make that election, it would not be excused from taking "appropriate action" under the EEOA. Clearly, any voluntary obligations undertaken by the State pursuant to the NCLB are in addition to its mandatory obligations under the EEOA.

The fact that NCLB imposes requirements different from the "appropriate action" required by the EEOA is further reinforced by the fact that States may only use the federal funds provided under Title III of the NCLB to "supplement, not supplant" the level of State and local public funds that would otherwise be expended for ELL programs. 20 U.S.C. § 6825(g). This provision, which is consistent with other federal education funding legislation, does not allow the State to use federal funds to provide ser-

vices that the State is otherwise obligated to provide under federal, State or local law.

As the United States Department of Education, the federal agency responsible for implementing the NCLB, explained in a recently-issued guidance on Title III's supplement not supplant rule:

> States, districts, and schools are required to provide core language instruction educational programs and services for limited English proficient (LEP) students. This requirement is established based on Title VI of the Civil Rights Act of 1964, and its implementing regulations, as interpreted by the Supreme Court of the United States (including the Supreme Court's ruling in Lau v. Nichols), and based on other significant case law (including Castaneda v. Pickard), the Equal Educational Opportunities Act of 1974, and other Federal, State, and local laws. Therefore, the use of State or subgrantee Title III funds to provide core language instruction educational programs, including providing for the salaries of teachers who provide those core services for LEP students, would violate the supplement not supplant provision in section 3115(g) of the Act, as such services are required to be provided by States and districts regardless of the availability of Federal Title III funds.

October 2, 2008 United State Department of Education Guidance reprinted in the Appendix at App.3. [8]

---

[8] The guidance, which simply reiterates the Department's long-standing policy on "supplement not supplant" also mentions that "[t]he Department has encountered situations in

(continued on following page)

Finally, as the Court of Appeals explained, the two statutes, while complementary, serve different purposes. The EEOA, adopted in 1974, is an anti-discrimination statute enforceable through a private right of action. 20 U.S.C. §§ 1703(f),1706. Under the EEOA, "an individual denied an equal educational opportunity . . . may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate." *Id.* at §1706.

NCLB on the other hand is directed at schools and the academic success of their students. Every court that has considered the issue has held that there is no private cause of action under NCLB. *See Fresh Start Academy v. Toledo Bd. of Educ.*, 363 F. Supp. 2d 910 (N.D. Ohio 2005); *ACORN v. NY City Dept. of Educ.*, 269 F. Supp. 2d 338 (S.D. N.Y. 2003); *Stokes v. United States Dept. of Educ.*, 2006 U.S. Dist. LEXIS 46838, 2006 WL 1892242 (D. Mass. July 10, 2006); *Blanchard v. Morton Sch. Dist.*, 2006 U.S. Dist. LEXIS 59417, 2006 WL 2459167 (W.D. Wash. Aug. 25, 2006); *Coachella Valley Unified Sch. Dist. v. California,* 2005 U.S. Dist. LEXIS 44825, 2005 WL 1869499 (N.D. Cal. Aug. 5, 2005).

Further, no portion of NCLB prescribes a particular or appropriate remedial language program or provides a remedy in the event such a program is not

---

which a State proposed to implement a law to reduce the amount of State aid available to local educational agencies (LEAs) for implementing language instruction educational programs for LEP students based on the amount of Title III funds its LEAs receive. Such statutes and policies violate Federal law." App. 4. Notably, the situation described is exactly what has occurred in Arizona under HB2064.

Finally, as the Court of Appeals explained, the two statutes, while complementary, serve different purposes. The EEOA, adopted in 1974, is an anti-discrimination statute enforceable through a private right of action. 20 U.S.C. §§ 1703(f),1706. Under the EEOA, "an individual denied an equal educational opportunity . . . may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate." *Id.* at §1706.

NCLB on the other hand is directed at schools and the academic success of their students. Every court that has considered the issue has held that there is no private cause of action under NCLB. *See Fresh Start Academy v. Toledo Bd. of Educ.*, 363 F. Supp. 2d 910 (N.D. Ohio 2005); *ACORN v. NY City Dept. of Educ.*, 269 F. Supp. 2d 338 (S.D. N.Y. 2003); *Stokes v. United States Dept. of Educ.*, 2006 U.S. Dist. LEXIS 46838, 2006 WL 1892242 (D. Mass. July 10, 2006); *Blanchard v. Morton Sch. Dist.*, 2006 U.S. Dist. LEXIS 59417, 2006 WL 2459167 (W.D. Wash. Aug. 25, 2006); *Coachella Valley Unified Sch. Dist. v. California,* 2005 U.S. Dist. LEXIS 44825, 2005 WL 1869499 (N.D. Cal. Aug. 5, 2005).

Further, no portion of NCLB prescribes a particular or appropriate remedial language program or provides a remedy in the event such a program is not

---

which a State proposed to implement a law to reduce the amount of State aid available to local educational agencies (LEAs) for implementing language instruction educational programs for LEP students based on the amount of Title III funds its LEAs receive. Such statutes and policies violate Federal law." App. 4. Notably, the situation described is exactly what has occurred in Arizona under HB2064.

provided. In fact, Title III, Part A of NCLB specifically provides, " [n]othing in this part shall be construed -- . . . (2) to require a State or a local educational agency to establish, continue, or eliminate any particular type of instruction program for limited English proficient children . . ." 20 U.S.C. § 6845. Therefore, as long as a school is making "adequate yearly progress," NCLB provides no "remedy" whatsoever even if some of the students in the school are being denied their constitutionally guaranteed right to language instruction.

Finally, any doubt that the EEOA and the cases interpreting it remain the controlling law with respect to the State's obligation to provide English language instruction is totally eliminated by the additional provision in NCLB that "[n]othing in this part shall be construed in a manner inconsistent with any Federal law guaranteeing a civil right." 20 U.S.C. § 6847. Thus, rather than replacing *Castaneda* and the other cases that have construed the EEOA, by including this affirmation, NCLB reinforces their continued applicability.

C. Neither the District Court Nor the Court of Appeals Usurped the State's Discretion to Determine How to Comply with the Judgment and the EEOA.

Finally, the Petitioners' argument that the lower courts in this case overstepped their authority in requiring compliance with the judgment is disingenuous. In advancing their argument, the Petitioners misrepresent or overlook several key facts. First, as the Court of Appeals recognized, this case is primarily about funding. The Orders at issue in this appeal all address the State's failure to adequately fund ELL programs in Arizona. Plaintiffs have

never challenged the methodology used by the State to instruct ELL students. Further, any issues with respect to services provided to ELL students were resolved without trial and were agreed to in the Consent Order, the terms of which have been codified into the State's education regulations. Arizona Administrative Code. 10 A.A.R. 353, effective March 8, 2004 (Supp. 04-1). The only unresolved dispute has been the State's failure to provide school districts with adequate funding to cover the costs of the required programs.

Second, in seeking this Court's review, the Petitioners accuse the Court of Appeals of "ruling that Arizona must enact legislation and create an earmarked funding source to fund the 'incremental costs' of ELL education..." Sup. Pet. at 10. See also L.I. Pet. at 29 ("The Ninth Circuit's decision turns on the premise that the EEOA's mandate that States take 'appropriate action' to overcome language barriers requires State legislatures to provide substantial funding earmarked for ELL programs.") The Court of Appeals, however, did no such thing. Nor has the district court. It is *the State* that created a school finance system where funding is calculated by first establishing a "base funding level" for all students and then allocating additional funds for those students who require more resources to educate, such as ELL students, gifted students and students with disabilities. Ariz. Rev. Stat. §15-943. It is *the State* that has adopted the system of incremental costs. The district court simply held, and Court of Appeals agreed, that *under this system that the State has adopted* the additional funding allocated for ELL students must be adequate and based on actual cost, not an arbitrary amount. The core requirement of the judgment is that having adopted an appropriate

methodology, the State must provide resources to implement that methodology, i.e. funding that is both adequate and not arbitrary. Neither the district court nor the Court of Appeals has ever *required* the State to maintain the weighted system it created in 1980 and continues to use today.

Third, the Petitioners' accusation that the Court of Appeals has "permit[ed] the district court to micromanage Arizona's funding of ELL programs," L.I. Pet. at 34, is demonstrably false. Similarly false are their assertions that "the district court anointed itself overseer of Arizona's public schools and enmeshed the federal judiciary in enduringly sensitive questions of local educational policy" and "the district court's orders are imposing requirements on Arizona's schools that are significantly out of step with current federal educational policies and requirements." L. I. Pet at 6 and 9.

Unfortunately, this gross distortion of the district court's conduct in this case comes as no surprise. For the past eight years, as the Arizona legislature has continually shown the district court nothing but contempt, the district court has demonstrated remarkable restraint and has been entirely deferential toward that body. Every order entered by the district court has given the State complete discretion to adopt whatever funding system it wanted, provided that the funding for ELL programs was neither inadequate nor arbitrary. Not a single order has been entered that imposed *any* requirement on Arizona schools. Indeed, before this recent claim that the district court was "micromanaging" education in Arizona, the Legislative Intervenors attempted to avoid being held in contempt for their failure to comply with the judgment by asserting that the district court's orders were directed only at

"the State" and did not require *them* to do anything. CR677. The fact is the district court has been a model of judicial restraint and has given the State complete discretion to determine how it will comply with the requirements of the EEOA. The Petitioners' claims to the contrary are completely baseless.

CONCLUSION

For the foregoing reasons, the Petitions for Writ of Certiorari should be denied.

Respectfully submitted,

TIMOTHY M. HOGAN
Counsel of Record
JOY E. HERR-CARDILLO
ARIZONA CENTER FOR LAW IN THE PUBLIC INTEREST
202 E. McDowell Rd.
Phoenix, Arizona 85004
(602)258-8850

Counsel for Respondents

December 1, 2008

The Office of Elementary and Secondary Education and the Office of English Language Acquisition are issuing this guidance to provide States with information on several funding issues, including "supplement not supplant" requirements, under Title III of the ESEA. This guidance represents the Department's current thinking on these issues. It does not create or confer any rights for or on any other person. Furthermore, this guidance does not impose any requirements beyond those required under applicable law and regulations. If you are interested in commenting on this guidance, please email the Department at oela@ed.gov or write to us at the following address: U.S. Department of Education, Office of English Language Acquisition, Lyndon Baines Johnson Building, 400 Maryland Avenue, SW, Room 5C-132, Washington, DC 20202-6510.

Supplement Not Supplant Provision of Title III of the ESEA

Section 3115(g) of Title III of the ESEA (hereafter "Title III") provides as follows:

> SUPPLEMENT, NOT SUPPLANT -- Federal funds made available under this subpart shall be used so as to supplement the level of Federal, State, and local public funds that, in the absence of such availability, would have been expended for programs for limited English proficient children and immigrant children

and youth and in no case to supplant such Federal, State, and local public funds.

In practice, the prohibition against supplanting under Title III means that recipients may not use those funds to pay for services that, in the absence of Title III funds, would be necessary to be provided by other Federal, or State, or local funds. [1]

While the Department recognizes that, to date, some States may have interpreted the provision above as not applying to funds the State is able to retain for State-level activities under section 3111(b)(2), it is the Department's interpretation of the law that the supplement not supplant provision of Title III applies to both funds retained for State activities – including the professional development, planning and evaluation, technical assistance, and providing recognition activities described in section 3111(b)(2) – and Title III funds expended by subgrantees.

OMB Circular A-133, which offers general guidance on the application of supplement not supplant provisions, explains that, generally, a supplanting violation is presumed when an institution uses Federal funds to provide services that it is required to make available under other Federal,

[1] Title I, Part A of the ESEA (hereafter "Title I") also includes a similar "supplement not supplant" provision in section 1120A(b). The "supplement not supplant" provision in Title I prohibits the supplanting of non-Federal funds. A significant distinction between the "supplement not supplant" provision in Title III and the "supplement not supplant" provision in Title I is that the Title III provision prohibits supplanting of Federal, as well as State and local, funds, whereas the Title I provision prohibits only the supplanting of State and local funds.

State, or local laws. See the 2008 Circular A–133 Compliance Supplement which, in accordance with 73 Fed. Reg. 32059 (June 5, 2008), is available at the following Internet address:

http://www.whitehouse.gov/omb/circulars/a133_compliance/08/ed.doc

Supplanting and Provision of Language Instruction Educational Programs

States, districts, and schools are required to provide core language instruction educational programs and services for limited English proficient (LEP) students. This requirement is established based on Title VI of the Civil Rights Act of 1964, and its implementing regulations, as interpreted by the Supreme Court of the United States (including the Supreme Court's ruling in Lau v. Nichols), and based on other significant case law (including Castaneda v. Pickard), the Equal Educational Opportunities Act of 1974, and other Federal, State, and local laws. Therefore, the use of State or subgrantee Title III funds to provide core language instruction educational programs, including providing for the salaries of teachers who provide those core services for LEP students, would violate the supplement not supplant provision in section 3115(g) of the Act, as such services are required to be provided by States and districts regardless of the availability of Federal Title III funds.[2]

---

[2] State and local education agencies (SEAs and LEAs) have raised a few questions regarding supplanting issues under consolidated funding arrangements or within Title I schoolwide

(continued on following page)

Reducing State and Local Funding on the Basis of the Amount of Title III Funds A Local Educational Agency (LEA) is Eligible to Receive

The Department has encountered situations in which a State proposed to implement a law to reduce the

---

programs. Under section 1114 of the ESEA, an LEA that fully consolidates Title III funds with other State, local, and Federal funds as part of a schoolwide program does not, in expending Title III funds, have to meet most of the statutory requirements of that program, including the non-supplanting requirement set out in section 3115(g) of the ESEA. Each school, however, must identify the specific programs being consolidated, and the amount each program contributes to the consolidation, and maintain records that demonstrate that the schoolwide program addresses the intent and purposes of each of the Federal programs whose funds are being consolidated to support the schoolwide program. In addition, while section 3115(g) would not apply to a schoolwide program that consolidates Title III funds with other Federal funds, section 1114(a)(2)(B) establishes a specific non-supplanting requirement for schoolwide programs. Under that provision, each school operating a schoolwide program must receive all the State and local funds it would otherwise receive to operate its educational program in the absence of Title I, Part A or other Federal education funds, "including funds needed to provide services that are required by law for...children with limited English proficiency." The Department has recently issued non-regulatory guidance on Title I fiscal issues, including on the consolidation of funds in Title I schoolwide programs. This guidance, which updates and modifies prior guidance on schoolwide programs issued by the Department, can be found on the Internet at the following address: http://www.ed.gov/programs/titleiparta/fiscalguid.doc.

amount of State aid available to local educational agencies (LEAs) for implementing language instruction educational programs for LEP students based on the amount of Title III funds its LEAs receive. Such statutes and policies violate Federal law. Section 9522 of the ESEA specifically prohibits a State from taking into consideration payments under any ESEA program (with the exception of Impact Aid) in determining the amount of State aid an LEA receives for the free public education of its children. Furthermore, any reduction in the amount of State funds an LEA receives to implement language instruction educational programs based on the receipt of Federal funds for its LEP population under Title III violates the non-supplanting provision of Title III.

Likewise, any efforts by an LEA or school to reduce State and local funds expended to implement language instruction educational programs serving LEP students based on the receipt of Federal Title III grant funds also violates the non-supplanting provision of Title III. In the absence of these Federal funds, LEAs would still be required to provide language instruction educational services and would need to expend funds to serve LEP students. For example, the Department has encountered numerous Title III subgrantees that, for budgetary reasons, use Title III funds to pay the salaries of their English as a Second Language (ESL) teacher. Typically, ESL teachers provide the core language instruction educational program services and their salaries are the responsibility of States and LEAs, not the Federal Government.

As a general rule, the use of Title III funds to pay for services to LEP students that were paid for in prior years with State, local, or other Federal funds also raises a presumption of a violation of the Title III

non-supplanting requirement. An LEA may be able to rebut this presumption, however, if it can demonstrate, through contemporaneous documentation, that it would not have continued to provide those services for LEP students with State, local, or other Federal funds because, for example, of budgetary constraints or competing educational priorities.

Use of Title III Funds to Develop ELP Assessments

A number of States have asked the Department to provide more specific information on the allowable uses of Title III funds to pay for the costs of developing ELP assessments, which are required under both section 1111(b)(7) of Title I and section 3113(b)(2) of Title III of the ESEA. This section of this letter addresses this particular issue.

Generally, a State or an LEA that is a Title III subgrantee cannot – without violating the non-supplanting requirement set out in section 3115(g) – use Title III funds to pay for the costs of developing annual ELP assessments. This is because section 1111(b)(7) requires States and LEAs to:

> provide for an annual assessment of English proficiency (measuring students' oral language, reading, and writing skills in English) of all students with limited English proficiency in the schools served by the State educational agency.

Because Title I requires States to administer annual ELP assessments, in general it would be a violation of Title III supplement not supplant requirements to use Title III funds to develop such assessments. This is because, in the absence of Title III funds, States

would still be required to develop and administer an annual ELP assessment under Title I.

Note that the supplement not supplant provision applies to all funds made available under subpart A of Title III, including funds the State retains for State-level activities under section 3111(b)(2). The Department recognizes that some States may have, to date, interpreted the supplement not supplant provision of Title III as not applying to State-level activities, as section 3111(b)(2)(C)(iii) allows States to reserve funds to help subgrantees with such activities as "identifying or developing, and implementing measures of English proficiency." However, because of the Title III prohibition against supplanting other Federal funds, there are only limited circumstances under which Title III funds reserved under section 3111(b)(2) may be used for costs related to ELP assessments.

Under Title III, State educational agencies (SEAs) are required under section 3113(b)(2) to develop ELP standards. The ELP assessments administered to determine whether Title III subgrantees are meeting Annual Measurable Achievement Objectives (AMAOs) under Title III must be aligned with the State's ELP standards. Because the alignment of the ELP assessment with ELP standards is not a requirement that an ELP assessment would otherwise have to meet under Title I, a State may use Title III State Activity funds it receives under section 3111(b)(2) to either:

(1) pay for the costs of developing an ELP assessment, separate from the ELP assessment required under Title I, that is aligned to the State's ELP standards, or

(2) pay for the costs of enhancing an existing ELP assessment required under Title I in order to align it with the State's ELP standards required under Title III.

If, as is typically the case, a single ELP assessment is used in a State to meet both the requirements of Title I and Title III, only the costs that were incurred specifically to meet Title III requirements not otherwise required under Title I may be paid for with Title III funds.

Use of Title III Funds to Administer ELP Assessments

Several States and LEAs have requested information from the Department about whether Title III State Activity funds and/or LEA subgrant funds may pay for the costs associated with administration of a State's annual ELP assessment. Specifically, States and LEAs have asked whether Title III funds may be used to pay for substitute teachers during test administration, for the scoring or reporting of ELP assessment results, for training incentives related to administering the ELP assessment, or for materials or equipment related to the administration of annual ELP assessments.

In general, the cost of administering such assessments may not be paid with Title III funds, including funds reserved by the State for State-level activities, because Title I already requires States to administer an annual ELP assessment to all LEP students.

In the case where a separate ELP assessment is administered for the purposes of Title III only, the costs associated with administering such an assessment may be paid with Title III funds, but only to the extent that those costs are over and above what

would be required to administer the ELP assessment required to be administered to all LEP students in the State under Title I.

Therefore, in general, Title III State and subgrantee funds may not be used to pay for substitute teachers or materials or for the cost of scoring State ELP assessments administered to LEP students, as these activities are all related to the administration of a State's annual ELP assessment required under Title I.

However, in cases in which a State has a separate or particular assessment for Title III purposes only, or prepares separate reports of student, school or LEA performance for Title III purposes only, Title III funds may be used for activities over and above what would have been in place absent the Title III requirements.

Use of Title I and other Federal Funds for State ELP Assessments

There are funds available from Title I and other Federal programs to help States develop and administer their ELP assessments.

For example, there is specific statutory authority for an SEA to use Title I State administrative funds, either alone or consolidated with other ESEA administrative funds, to develop State ELP assessments. This authority is found in section 9201(f) of the ESEA, which states: "In order to develop challenging State academic standards and assessments, a State educational agency may consolidate the amounts described in subsection (a) [consolidation of State administrative funds under any ESEA program or other program designated by the Secretary] for those

purposes under Title I." Because section 1111(b)(7) of Title I requires annual ELP assessments, the Department believes that section 9201(f) authorizes the use of State administrative funds for this purpose.

In addition, section 6111 of the ESEA, which provides additional funds to States for assessments and related activities, specifically permits a State to use those funds "to pay the costs of the development of the additional State assessments...required by section 1111(b)," which includes annual ELP assessments. Further, section 6111(2) specifically permits the use of 6111 funds to administer the assessments required by section 1111(b), but only after development of the assessments is complete.

Finally, the Department has awarded competitive enhanced assessment grant funds under section 6112 to consortia of States to develop ELP assessments in compliance with Title III.

Screening and Placement Assessments for LEP Students

While most of the discussion above focuses on the annual ELP assessments States are required to develop and administer to track the progress of LEP students' attainment of English language skills, it should also be noted that States and LEAs are responsible for identifying LEP students who may need language education services, regardless of their receipt of Federal funds. Many States and LEAs have developed language assessments used for the purposes of screening students for language proficiency and placing students into core language instruction educational programs. The development and administration of such screening or placement

assessments may not be paid for out of Title III or Title I Federal funds. This is because States and LEAs would be required to identify and make placement decisions for LEP students even without Federal funding. Thus, it would violate both the Title I and Title III "supplement not supplant" provisions to use such Federal funds for the development or administration of LEP screening or placement assessments.

REPLY BRIEF

115

(5)

Supreme Court, U.S.
FILED
DEC 16 2008
OFFICE OF THE CLERK

No. 08-289

In The
Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF ARIZONA,

Petitioner,

v.

MIRIAM FLORES, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

COMBINED REPLY BRIEF TO RESPONSES FILED BY RESPONDENTS

ERIC J. BISTROW,
Counsel of Record
DARYL MANHART
MICHAEL S. DULBERG
MELISSA G. IYER
BURCH & CRACCHIOLO, P.A.
702 E. Osborn, Suite 200
Phoenix, Arizona 85014
phone: 602-274-7611
fax: 602-234-0341

Attorneys for
Petitioner Superintendent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

		Page
I.	Reasons Why Review Should be Granted...	1
	A. Overriding National Issues are at Stake	1
	B. This Court Should Determine the Meaning of "Appropriate Action"	2
	C. The Relationship Between NCLB and §1703(f) of the EEOA Needs Clarification by this Court	4
II.	Other Issues Raised by Respondents	8
	A. The Original 2000 Order Dealt with a Different Era in Terms of Programming and Costs	8
	B. Respondents' Recitation of Remedial Orders is Irrelevant	10
	C. Consideration of House Bill 2064 is Also Irrelevant	10
	D. Compliance with "Appropriate Action" Should Not be Defined Solely in Terms of Funding	11
III.	Conclusion	13

TABLE OF AUTHORITIES

Page

CASES

Castañeda v. Pickard, 648 F.2d 989 (5th Cir. 1981) 6, 7

Flores v. Arizona, 172 F.Supp.2d 1125 (D. Ariz. 2000) 6, 9, 13

Flores v. Arizona, 516 F.3d 1140 (9th Cir. 2008) 5, 12

Honig v. Doe, 484 U.S. 305 (1988) 3

Milliken v. Bradley, 418 U.S. 717 (1974) 3

Missouri v. Jenkins, 455 U.S. 33 (1990) 3

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) 4

FEDERAL STATUTES

20 U.S.C. §1703(f) ..... *passim*

20 U.S.C. §6801 ..... *passim*

20 U.S.C. §6812(1) 4

STATE STATUTES

Ariz. Rev. Stat. Ann. §15-751 8

Ariz. Rev. Stat. Ann. §15-756.01 10

Arizona House Bill 2064 ..... 10, 11

I. Reasons Why Review Should be Granted.

A. Overriding National Issues are at Stake.

By 2006, there were over five million English Language Learner ("ELL") students across the United States. This represented a 57% increase in ELL numbers since 1996. In nine states, primarily in the southwest, the number of K-12 ELL students exceeds 10% of total enrollment. Indeed, Arizona's growth of ELL students during this period has exceeded 100%.[1] Seventeen states have funding schemes that mirror Arizona's. All of these funding schemes provide general base funding for all students plus specific monies based on a weighted formula for ELL students. There are an additional seven states that provide general base funding, but instead of using a weighted formula, actually specify an additional lump sum for ELL students.[2] Thus, half of the states in this country provide an extra stipend when a student is classified as ELL. How the needs of ELL students are met is a matter of transcendent national importance as states grapple with the best strategies and most cost effective methods of ensuring that ELL students overcome their language deficiencies.

---

[1] These statistics are taken from a study published by the National Clearinghouse for English Language Acquisition & Language Instruction Educational Programs ("NCELA") which is funded by the U.S. Department of Education ("D.O.E."). Its data may be found at www.ncela.gwu.edu/policy/states/index.htm.

[2] *See* note 7, Superintendent's Petition.

This case presents two critical issues that bear on federal ELL programming and funding requirements. Neither issue has ever been addressed by this Court. The first issue, at its core, involves an interpretation of what "appropriate action" means under §1703(f) of the Equal Education Opportunity Act of 1974 ("EEOA"). The fundamental question is what steps must a state take to ensure compliance with these vague words so that it does not run afoul of federal law. The second issue concerns the intersection between §1703(f) of the EEOA and the No Child Left Behind Act ("NCLB"), 20 U.S.C. §6801, *et seq.* which was enacted in 2001, after the initial ruling in this case. Here, the question is how one reconciles the vague requirements of "appropriate action" under §1703(f) and the very specific ELL program and accountability requirements set forth in NCLB. In short, if a state complies with systemic ELL programming requirements approved by the D.O.E. for NCLB, can that state still be found to be in violation of the vague mandate to "take appropriate action" under §1703(f)?

B. This Court Should Determine the Meaning of "Appropriate Action."

A huge philosophical divide exists as to what constitutes "appropriate action" under §1703(f). The Superintendent argues that §1703(f) should be interpreted as a performance statute so that "appropriate action" is met when effective programs permit ELL students a reasonable opportunity to overcome their

language deficiencies. Funding should not be a federal concern when successful ELL programming, the ultimate aim of the statute, has been achieved. Respondents and the lower courts disagree. They assert that once a state chooses a funding scheme that provides base-level funding, plus an additional stipend for ELL students, "appropriate action" requires that this stipend cover the incremental costs of ELL education without considering any other sources of funding or the effectiveness of ELL programs. As stated by the Respondents-Plaintiffs' Answering Brief (at 33) filed in the Ninth Circuit (emphasis added):

> In determining whether the judgment has been satisfied, *the issue is not whether the needs of ELL students have been met but* whether the State has established a *funding* system for ELL students and programs that is not arbitrary.

Resolving this philosophical difference is critical, especially as ELL students consume a significant and ever-increasing portion of educational budgets. State funding schemes provide school districts with numerous sources of funding to mount programs for ELL students and non-ELL students. These programs can be implemented in different ways, at different costs, and with different combinations of revenue sources.[3]

---

[3] Indeed, this Court has repeatedly recognized that programming and financing for public education are distinctly state and local concerns. *See Missouri v. Jenkins*, 455 U.S. 33, 51-52 (1990); *Honig v. Due*, 484 U.S. 305, 309 (1988); *Milliken v.*

(Continued on following page)

The question presented is whether a state can be forced under §1703(f) to tax its citizens and create a special stream of income for ELL students even though effective ELL programs have already been achieved through other combinations of financial resources, leadership, and educational strategies. This question has application to twenty-five states (including Arizona) with similar funding schemes. Accordingly, a decision providing an answer to this question and defining what constitutes "appropriate action" will not only resolve this controversy, but will provide guidance on the extent to which a state can manage its own affairs in achieving compliance with §1703(f).

C. The Relationship Between NCLB and §1703(f) of the EEOA Needs Clarification by this Court.

The second issue needing clarification from this Court is whether a state can simultaneously comply with explicit programming and accountability requirements for ELL students under NCLB and still be in violation of §1703(f) of the EEOA. It is clear from the text of the EEOA and NCLB that the basic purpose of both statutes is to ensure that there are effective ELL programs.[4] Further, as pointed out in

---

Bradley, 418 U.S. 717, 741-42 (1974); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973).

[4] *Compare* 20 U.S.C. §6812(1) *with* 20 U.S.C. §1703(f).

the Superintendent's Petition, NCLB does not merely require a state to pledge that it will reach some lofty goal of language proficiency, but prescribes a series of programs that a state must undertake so that ELL students have a reasonable opportunity to achieve English fluency and academic achievement. Those programs are then submitted to the D.O.E. for approval. It is inconsistent for the federal government, through the D.O.E., to affirm that a state government provides effective ELL programming before it awards that state money under NCLB, yet through the federal judiciary, claim that a state is not providing effective ELL programming under §1703(f).

The Respondent-Plaintiffs and the Ninth Circuit claim that §1703(f) and NCLB serve different purposes in that the EEOA is an "anti-discrimination" statute, while NCLB is all about a "general plan gradually to improve overall performance of schools." (Respondents'-Plaintiffs' Response, p.26; *Flores v. Arizona*, 516 F.3d 1140, 1172 (9th Cir. 2008).[5] They also claim that there is no private remedy under NCLB while one exists under §1703(f). (Respondent-Plaintiffs' Response, pp.26-27). Respondents-Plaintiffs then assert that NCLB does not prescribe a

---

[5] This case began as a class action to redress discrimination claims against ELL students in the Nogales Unified School District ("NUSD"). At the plaintiffs' urging, however, the District Court has changed the focus of the suit to generally address systematic ELL programming and funding requirements in Arizona, *statewide*.

particular ELL program that a state must institute, and, therefore, claim that the Superintendent's position would repeal §1703(f) and deny ELL students the ability to redress grievances under the statute. (Respondent-Plaintiffs' Response, p.27).

That §1703(f) and NCLB are mutually exclusive statutes with different purposes and different remedies is a serious point of contention with broad ramifications for every state in the country. The Superintendent argues that these two statutes touch upon the same subject, have the same aims, and should be construed harmoniously. There is no reason why, in a proper case, ELL students cannot invoke a remedy under §1703(f), when the particular circumstances demonstrate that they have been deprived of a reasonable opportunity to learn English. However, that is not the issue here. The issue here is whether it is proper to claim that Arizona is systematically failing to provide effective ELL programs under the EEOA's vague standard of "appropriate action," when, as a condition of NCLB funding, the D.O.E. has determined that Arizona does provide systemic and effective ELL programs.

The Respondents-Plaintiffs also argue that "appropriate action" under §1703(f) cannot be shown unless the tests set forth in *Castañeda v. Pickard*, 648 F.2d 989 (5th Cir. 1981), have been met. (Respondents-Plaintiffs' Response, pp.22-23). Indeed, the District Court, in *Flores v. Arizona*, 172 F.Supp.2d 1125, 1238-39 (D. Ariz. 2000), (the "original 2000 order") rested its decision on the legal rationale set

forth in *Castañeda*. NCLB was enacted *after Castañeda* and the original 2000 order. NCLB altered the way states approached, conducted, and were responsible for ELL programs. After the congressional enactment of NCLB, which provides specific directions as to what states must do to mount effective ELL programs, a fundamental question remains as to whether the interpretation of "appropriate action" should continue to be solely governed by the *Castañeda* doctrine.

Once again, there is no Supreme Court decision addressing whether the two statutes, §1703(f) and NCLB, are mutually exclusive or complementary. Nor is there any decision addressing whether *Castañeda* should continue to be the last word on the subject of what is required by the statutory requirement of "appropriate action" in the face of the comprehensive scheme set forth by Congress when it enacted NCLB. The answers to these issues will provide much needed clarity to the states as they strive to meet the substantial challenges now posited by the large ELL population in this country.

Respondents did not refute any of the facts or distinguish any of the cases presented by the Superintendent's Petition. They rested their assertions on certain legal conclusions. This Court should resolve the debate as to what is required by a state to meet the needs of its ELL students under §1703(f) and NCLB.

II. Other Issues Raised by Respondents.

A. The Original 2000 Order Dealt with a Different Era in Terms of Programming and Costs.

Respondents-Plaintiffs are mired in a time warp. They claim that the original 2000 order demonstrated that Arizona's funding system provided insufficient and arbitrary monies so that NUSD was unable to implement the bilingual and ESL theories of instruction approved by the State. (Respondents-Plaintiffs Response, pp.1, 2, 19). They also claim that Arizona has failed to rectify the funding deficiencies addressed in the original court order. (Respondents-Plaintiffs' Response, p.19).

The Superintendent is not challenging the original 2000 order. The original 2000 order dealt with a different era in terms of educational theories, programming, and funding. It is not necessary to repeat the myriad of changes cited in the Superintendent's Petition that have taken place since 2000, including the fact that the educational theories and costs associated with those theories were swept away when Arizona voters passed Proposition 203 in November 2000.[6] Respondents do not dispute these changes. Arizona's ELL programs and the funding for those programs are drastically different now. What the

---

[6] Proposition 203, now codified at Ariz. Rev. Stat. Ann. §15-751, *et seq.*, essentially discarded bilingual and ESL programs for ELL students in favor of structured English immersion programs.

Superintendent is challenging are the orders emanating from the January 2007 hearings. The evidence adduced at those hearings showed that a confluence of factors including the implementation of a *different* ELL educational theory, the doubling of Group "B" weights, large increases of other sources of income through state and local funding, and focused leadership led to effective ELL programs. All of this was *ignored* when the Ninth Circuit concluded that the violation of §1703(f) was ongoing despite effective programs.

The District Court, in the original 2000 order, declared that "Defendants are violating the EEOA (20 U.S.C. §1703(f)" because the "state has failed to follow through with practices, resources, and personnel necessary to transform theory into reality." *Flores*, 172 F.Supp.2d at 1239-40. That is no longer true. The Superintendent demonstrated, without refutation, that funding in 2007 was adequate to deliver an effective ELL program that consisted of an informed educational theory, qualified teachers, small class sizes, plentiful instructional materials, and significant intervention programs. Unlike 2000, in 2007, the State did follow through "with practices, resources, and personnel necessary to transform theory into reality."

The central issue faced in the original 2000 order was whether the Defendants caused NUSD to be in violation of §1703(f). The critical words in that statute are whether an educational agency has taken "appropriate action to overcome language barriers."

The Respondents-Plaintiffs and the lower courts have fixated on the problem of funding in 2000 although the funding levels and programs in 2007 were completely different. By treating §1703(f) as a funding statute even though the word "funding" cannot be found in the statute, the lower courts have failed to address the threshold question of what "appropriate action" means.

B. Respondents' Recitation of Remedial Orders is Irrelevant.

Instead of dealing with the large changes in funding and ELL programming, Respondents-Plaintiffs devote seven pages of their Response to the remedial orders issued by the District Court subsequent to the original 2000 order. The Superintendent concedes there were a series of remedial orders. Those remedial orders were not the subject of the January 2007 hearings and are irrelevant in deciding the critical issues raised in the Superintendent's Petition.

C. Consideration of House Bill 2064 is Also Irrelevant.

The Respondents also devote substantial space to dealing with Arizona House Bill 2064, now codified at Ariz. Rev. Stat. Ann. §15-756.01, *et seq.* This legislation contains numerous provisions that concern both funding and program content for ELL learners. The District Court and the Ninth Circuit approved House Bill 2064 with two exceptions. They nullified the two year designated funding limit for ELL students and

federal offsets that were to be used in calculating certain monies to be used for ELL purposes.[7] The Superintendent has not sought review of these rulings.

Reference to House Bill 2064 is irrelevant to the Superintendent's Petition here. Massive changes in funding, programs, oversight, and changes in the law under NCLB dramatically changed the landscape of ELL education. Because of these changes, NUSD conducts an effective program that complies with federal requirements. These structural changes took place without the funding mechanism and two-year limitation of House Bill 2064. Consequently, neither current nor future compliance with §1703(f) depends on House Bill 2064. The contents of House Bill 2064 shed no light on whether Arizona demonstrated that it now meets the "appropriate action" requirement of §1703(f).

D. Compliance with "Appropriate Action" Should Not be Defined Solely in Terms of Funding.

The Superintendent contends that federal oversight should end because compliance with the "appropriate action" requirement of §1703(f) has been achieved. Respondents-Plaintiffs dispute that

---

[7] As noted by Respondents-Plaintiffs, House Bill 2064 is now being implemented without the offending positions that were struck down by the District Court and Ninth Circuit.

assertion arguing first that the original 2000 order required only more funding and wholly disregarded the importance of effective programming. (Respondents'-Plaintiffs' Response, pp.27-28). Second, they claim that the Ninth Circuit did not require earmarked funding but that such requirement was self-inflicted by Arizona because of its base-level funding system and its allocation of additional monies for "ELL students, gifted students, and students with disabilities."[8] (Respondents'-Plaintiffs' Response, p.28). These claims actually underscore why the Petition should be granted.

Any notion that the Ninth Circuit did not direct the State to provide an earmarked or a special stream of funding for ELL students is misplaced. The Ninth Circuit specifically found that it would not "absolve the state from providing adequate ELL *incremental* funding." *Flores v. Arizona*, 516 F.3d 1140, 1168 (9th Cir. 2008) (emphasis added). After claiming that it was inappropriate to focus on the large increases in general educational funding since 2000, the Ninth Circuit then stated that "appropriate action" requirements could not be met by "diverting base-level funds" to benefit ELL students. *Id.* at 1149, 1150, 1155, & 1171. The Ninth Circuit clearly defined the "appropriate action" requirements of §1703(f) in terms of earmarked funds for ELL students. Further,

---

[8] Respondents, the State of Arizona and State Board of Education, make a similar statement in their Response at pp.22-23.

base-level funding is provided for non-ELL and ELL students. The Superintendent, without success, sought to persuade the Ninth Circuit that large general funding increases benefited *all* students, including ELL students, by enabling school districts to hire better teachers, lower class sizes, provide more materials, and develop better programming.

Respondents-Plaintiffs continue to define compliance with §1703(f) in terms of funding not in terms of "appropriate action." The EEOA is silent about funding, but demands that states provide adequate programs so ELL students have a reasonable chance to learn English. The Superintendent agrees that in 2000, there were insufficient resources that inhibited NUSD from instituting a meaningful English acquisition program. As a result, in the original 2000 order, the District Court set forth an exhaustive series of findings of fact and conclusions of law describing the inability of NUSD to deliver sufficient services to ELL students for its bilingual and ESL programs. The District Court, in that same 2000 order, declared Arizona to be in violation of the "appropriate action" requirement of §1703(f) because Group "B" weight in *combination* with base-level funding led to these insufficient services. *Flores v. Arizona*, 172 F.Supp.2d at 1238-39.

III. Conclusion.

Funding is simply a means for States to attain "appropriate action" and not an end unto itself. If

review is not granted, then the lower courts' erroneous interpretation of the EEOA will permit federal judges to dictate how states manage and fund their ELL programs. This is contrary to accepted notions of federalism and comity.

Further, states should not be exposed to claims that they violated the EEOA when effective programs are conducted under NCLB. It is critical for this Court to interpret the "appropriate action" requirement of §1703(f) consistently with the subsequently enacted standards of NCLB.

For the foregoing reasons, review should be granted.

Respectfully submitted,

ERIC J. BISTROW,
Counsel of Record
DARYL MANHART
MICHAEL S. DULBERG
MELISSA G. IYER
BURCH & CRACCHIOLO, P.A.
702 E. Osborn, Suite 200
Phoenix, Arizona 85014
phone: 602-274-7611
fax: 602-234-0341

Attorneys for
Petitioner Superintendent

December 17th, 2008

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
OCT 6 - 2008
OFFICE OF THE CLERK

Nos. 08-289 & 08-294

In the Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF ARIZONA, PETITIONER
v.
MIRIAM FLORES, *ET AL.*, RESPONDENTS

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES AND PRESIDENT OF THE ARIZONA SENATE, PETITIONERS
v.
MIRIAM FLORES, *ET AL.*, RESPONDENTS

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

DANIEL J. POPEO
RICHARD A. SAMP
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

GENE C. SCHAERR
Counsel of Record
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006
(202) 282-5000

PROF. ROSS SANDLER
PROF. DAVID SCHOENBROD
New York Law School
57 Worth Street
New York, NY
(212) 431-2100

MICHAEL J. FRIEDMAN
ARI E. WALDMAN
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166
(212) 294-6700

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether a federal-court injunction seeking to compel institutional reform should be modified in the public interest when the original judgment could not have been issued on the state of facts and law that now exist, even if the named defendants support the injunction.

2. Whether compliance with NCLB's extensive requirements for English-language instruction is sufficient to satisfy the EEOA's mandate that States take "appropriate action" to overcome language barriers impeding students' access to equal educational opportunities.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION AND INTERESTS OF *AMICUS CURIAE* 1

STATEMENT 3

A. Congress' Enactment of NCLB 3

B. The Post-NCLB Proceedings 5

REASONS FOR GRANTING THE PETITION 8

I. THE NINTH CIRCUIT'S OVERLY DEFERENTIAL STANDARD OF REVIEW ENTRENCHES JUDICIAL INTRUSIONS INTO POLITICAL PROCESSES FOR LONGER THAN IS CONSTITUTIONALLY PERMISSIBLE, AND NEEDS TO BE CORRECTED BY THIS COURT 8

II. REVIEW IS NEEDED TO GIVE EFFECT TO CONGRESS' MANDATES IN THE NO CHILD LEFT BEHIND ACT 16

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES:

Allen v. *Wright*,
468 U.S. 737 (1984).....9

Board of Educ. of Oklahoma City Pub. Schs. v. *Dowell*, 498 U.S. 237 (1991).....11-12

Castaneda v. *Pickard*,
648 F.2d 989 (5th Cir. 1981).....*passim*

Dowell v. *Bd. of Educ. of the Oklahoma City Pub. Schs.*,
890 F.2d 1483 (10th Cir. 1989).....11-12

Dowell v. *Bd. of Educ. of the Oklahoma Pub. Schs.*, 338 F. Supp. 1256 (W.D. Okla. 1972).....11

Flores v. *Arizona*,
No. CV-92-596, 2001 WL 1028369 (D. Ariz. Jun. 25, 2001).....3

Food & Drug Admin. v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).....22

Frew v. *Hawkins*,
540 U.S. 431 (2004).....13-16

Lau v. *Nichols*,
414 U.S. 563 (1974).....4, 17

Rufo v. *Inmates of Suffolk County Jail*,
502 U.S. 367 (1992).....12-13, 15

United States v. *Fausto*,
484 U.S. 439 (1988).....22

United States v. *Swift & Co.*,
286 U.S. 106 (1932).....*passim*

Vermont Agency of Natural Resources v. *U.S. ex rel. Stevens*, 529 U.S. 765 (2000) 22

STATUTES:

20 U.S.C. § 1703(f) 3, 17, 19

20 U.S.C. §§ 6301 et seq 3

20 U.S.C. §§ 6801, *et seq.* 5

20 U.S.C. § 6812(2) 19

20 U.S.C. § 6812(9) 20

20 U.S.C. § 6825(c) 20

20 U.S.C. § 6825(d) 20

20 U.S.C. § 6842 21

MISCELLANEOUS:

147 Cong. Rec. S13322, S13328 (Dec. 17, 2001) 5

147 Cong. Rec. S13365, S13420 (Dec. 18, 2001) 5

Letters from The Federal Farmer to The Republican No. 3 (Oct. 10, 1787), *in* 1 The Debate on the Constitution 245 (Bernard Bailyn ed., 1993) 8

Publius [Alexander Hamilton], The Federalist No. 78 (May 28, 1788), *in* 2 The Debate on the Constitution 467 (Bernard Bailyn ed., 1993) 8-9

Sandler & Schoenbrod, *Democracy By Decree* (2002) 12

Sandler & Schoenbrod, "From Status to Contract and Back Again: Consent Decrees in Institutional Reform Litigation," 27 Review of Litigation 115 (2007) 14

White House Report, http://www.whitehouse.gov/news/reports/no-child-left-behind.html 4

INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*[1]

This case presents an extraordinary example of a state-level political minority losing its agenda at the ballot box but nonetheless imposing its will on the majority through the intervention of sympathetic federal courts. Only this Court can reverse the Ninth Circuit's remarkable expansion of federal judicial authority and, in so doing, prevent the enormous damage that court's ruling will otherwise do to the people of Arizona and their democratic institutions.

At the heart of this case is an effort by the Governor of Arizona and her allies to pass a broad education spending increase which the Arizona Legislature rejected in favor of a competing and less expensive solution. Rather than accept the decision by the people's representatives, the Governor instead sought to use an outdated injunction order, naming her state *as a defendant*, to compel the Legislature to pass her agenda.

The courts below were happy to accommodate the Governor. Acting solely on the authority of a 1974 federal statute requiring states to "take appropriate action to overcome language barriers that impede equal participation by its students in its instructional program," the district court struck down the Legisla-

---

[1] The parties have consented to the filing of this brief. Letters of consent have been lodged with the Court. In accordance with Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel has made a monetary contribution to the preparation or submission of this brief. More than ten days prior to the due date, counsel for Amicus provided counsel for respondents with notice of its intent to file this brief.

ture's new program. The district court took umbrage at the fact that the Legislature's approach did not follow the exact framework for improving Arizona's limited English proficient ("LEP") education program that the district court itself had unilaterally designed seven years earlier. The district court's framework measured remedial success in one way only – by the amount of LEP funding allotted per LEP student – rather than in the manner subsequently required by Congress in the No Child Left Behind ("NCLB") law. But the district court nonetheless struck down the Legislature's new program because it was not faithful to the district court's gloss on what Congress meant in 1974.

The district court's approach far exceeded its authority to interfere with duly enacted state legislation, and flouted the express findings of the very Congress whose earlier work it was purporting to enforce. The district court's unbridled exercise of judicial power thus raises grave concerns not only of federalism, but also of separation of powers. Indeed, as Montesquieu perceptively noted more than 250 years ago, "there can be no liberty where . . . the power of judging be not separated from the legislative . . . powers." Montesquieu, The Spirit of the Laws (1748).

The Washington Legal Foundation ("WLF") takes this canon to heart. WLF is a national nonprofit public interest law and policy center dedicated to, among other issues, opposing intrusions by the federal government into the operation of state governments, and of the federal judiciary into the proper functions of the other federal branches. WLF is appalled by the district court's interference with the local political process in this case, and urges review and reversal to

restore the proper separation of powers and federalism principles that were violated by the court below.

STATEMENT

This case began as a challenge to the adequacy of the LEP program in the Nogales Unified School District ("Nogales"). After several years of litigation, in 2000, a class of Nogales parents (named "Flores" after the lead plaintiff) succeeded in obtaining a declaratory judgment finding Nogales's LEP program to be in violation of the Equal Education Opportunity Act of 1974, 20 U.S.C. § 1703(f) (the "EEOA"). The central basis for the district court's finding of liability was that the amount of LEP funding per LEP student then being spent in Nogales was one-third of the average LEP funding per student found in the only study of the subject then available. *See* Appendix to Petition in No. 08-294 ("Pet. App.") at 149a.

The district court's finding of liability was followed a year later by an injunction directing the State of Arizona to figure out how much ideally should be spent per student, and to then spend that amount. *Flores* v. *Arizona*, No. CV-92-596, 2001 WL 1028369 (D. Ariz. Jun. 25, 2001).

A. Congress' Enactment of NCLB

The following year, in 2002, Congress enacted the No Child Left Behind Act, 20 U.S.C. §§ 6301 et seq. ("NCLB"), which radically changed the school funding landscape, particularly with respect to LEP education.

First and foremost, NCLB reflected a broad, bipartisan consensus that schools needed to be held to stricter standards of accountability. As President Bush stated, NCLB was "based on the fundamental

notion that an enterprise works best when responsibility is placed closest to the most important activity of the enterprise, when those responsible are given greatest latitude and support, and when those responsible are held accountable for producing results." *See* http://www.whitehouse.gov/news/reports/no-child-left-behind.html.

Congress devoted Title III of NCLB to the education of LEP children. In addition to imposing strict new accountability standards, Title III was intended to put an end to the common scenario of LEP students being isolated from their peers and left indefinitely in a dead-end cocoon of instruction in their native language.

By contrast, under the outdated statute invoked by the respondents here, schools were not actually required to teach LEP students English. All that was required was "appropriate action" to overcome their language barriers. In many instances, this meant teaching LEP students in their native language. *See, e.g., Lau* v. *Nichols*, 414 U.S. 563, 564-65 (1974) (noting that "[n]o specific remedy is urged upon us. Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another"); *Castaneda* v. *Pickard*, 648 F.2d 989, 1009 (5th Cir. 1981) (finding that "Congress, in describing the remedial obligation it sought to impose on the states in the EEOA, did not specify that a state must provide a program of 'bilingual education'").

This system did not work. As one of NCLB's sponsors, Senator Gregg, explained, bilingual education "got off track":

> Instead of kids learning English, we ended up isolating kids, took them on a train track that took them to their language and left them there, put them in schools and classrooms where they basically were being taught in their language and they were not being allowed to learn English essentially, or they were not being asked to learn English.

147 Cong. Rec. S13322, S13328 (Dec. 17, 2001). Congress disapproved of this result for the obvious reason that it hindered immigrant children's ability to compete in this country's predominantly English-speaking workforce once they got out of school. *Id.*

NCLB sought to fix this problem in two ways: First, it required LEP programs to produce results in teaching LEP children English, and, second, it permitted parents to pull their LEP children out of bilingual classes if they thought they would be better served in English-only classes. Senator Lott heralded the latter of these changes as "one of the bill's most significant achievements." 147 Cong. Rec. S13365, S13420 (Dec. 18, 2001).

Congress implemented these changes through a detailed statutory framework. It required states and local school districts to (1) implement new educational programs containing certain enumerated basic features, (2) develop quantifiable performance benchmarks, and (3) to report annually on their success in meeting those benchmarks. *See* 20 U.S.C. §§ 6801, *et seq.*

B. The Post-NCLB Proceedings

Arizona education programs were revised significantly to comply with NCLB's numerous precise mandates. The process moved slowly, particularly after

the inauguration of a new Governor in 2003, which placed control of the executive and legislative branches in opposing parties. Work on a new LEP program did not begin until 2005. The Legislature passed three different bills to address LEP education, but the Governor considered each to be inadequately funded and vetoed all of them.

Finally, the Governor sought refuge in the district court which had long shown a preference for the large funding increases she had asked for, but failed to win, in the Legislature. As part of her strategy, the Governor permitted a fourth attempt at LEP program revision – HB 2064 – to become law, stating that she was "convinced that getting this bill into court now is the most expeditious way ultimately to bring the state in compliance with federal law." And she admitted that she had allowed the bill to become law "so that we can move this dispute to a different forum and get a ruling from the Flores Court as to its sufficiency." Pet. App. at 26a n.16.

The district court was only too happy to oblige. Instead of examining whether the Legislature's new programs satisfied the detailed requirements for LEP programs that Congress had spelled out in 2002 in NCLB – which the Legislature's new programs plainly *did* satisfy – the district court struck down much of the new programs on the ground that they did not satisfy the district court's unilateral interpretation of what Congress wanted back in 1974 when it passed the EEOA. *See* Pet. App. at 111a-115a. The district court thus ignored the NCLB and returned to its old spending per LEP student test, which coincidentally could only be satisfied by the substantial spending increases advocated by the Governor and her minority allies.

Because the Governor supported this result and controls the State's litigation positions, the legislative majority was unrepresented in the district court. But the legislative petitioners intervened to give the legislative majority a voice (and to contest the punitive fines the district court was threatening against the Legislature), and appealed the district court's ruling.

The Ninth Circuit affirmed. Like the district court, the Ninth Circuit could not get beyond its fixation on whether the State had complied with the 2001 injunction requiring increased LEP spending per student.

In insisting on compliance with the 2001 injunction, moreover, the Ninth Circuit applied an overly-strict standard for determining whether a prior injunction should be lifted. Whereas this Court's precedent requires district courts to ask whether the federal law upon which an injunction was based is still being violated, the Ninth Circuit looked only at whether the facts or law upon which the injunction was based had changed. *See* Pet. App. at 61a-63a. The Ninth Circuit's approach thus gave far greater deference to the original order than it should have.

The Ninth Circuit then misapplied its overly-strict standard, finding that the underlying law had not changed when in fact it had changed with the passage of NCLB. The Ninth Circuit wrote that the EEOA and NCLB, despite having similar objectives, proceeded on two different tracks, and that NCLB compliance, despite being more strictly defined, did not necessarily entail EEOA compliance. Pet. App. at 72a-75a.

The Ninth Circuit went on to approve the district court's continued focus on its own LEP-funding-per-

student test, which necessarily yielded the outcome the Governor and her minority allies sought: more spending, over the objection of Arizona's voters.

REASONS FOR GRANTING THE PETITION

In addition to the compelling reasons offered in the petition, *amicus* wishes to highlight two critical considerations supporting review in this case. First, the Ninth Circuit's standard of review of a motion for relief from an injunction is at odds with this Court's precedent, in that it gave the prior decree far more deference than it deserves. Throughout the vast area overseen by the Ninth Circuit, this error will entrench judicial intrusions into the political process for longer than the minimum necessary to enforce federal laws, thereby trampling bedrock principles of separation of power and federalism. Second, the decisions below fail to give effect to Congress' clear mandate in the No Child Left Behind Act. Review is therefore warranted to enforce those requirements.

I. THE NINTH CIRCUIT'S OVERLY DEFERENTIAL STANDARD OF REVIEW ENTRENCHES JUDICIAL INTRUSIONS INTO POLITICAL PROCESSES FOR LONGER THAN IS CONSTITUTIONALLY PERMISSIBLE, AND NEEDS TO BE CORRECTED BY THIS COURT

During the founding era, the limits on the power of federal courts to issue broad injunctions were one of the few issues upon which both the Federalists and the Anti-Federalists agreed. *See* Letters from The Federal Farmer to The Republican No. 3 (Oct. 10, 1787), *in* 1 The Debate on the Constitution 245, 273 (Bernard Bailyn ed., 1993) (Anti-Federalist concerns that federal courts would abuse equity powers); Pub-

lius [Alexander Hamilton], The Federalist No. 78 (May 28, 1788), *in* 2 The Debate on the Constitution 467, 468 (Bernard Bailyn ed., 1993) (Federalist response that judges were capable of "no active resolution whatever"). Yet modern institutional reform litigation raises the very specter of legislation by unelected judges that the framers uniformly rejected. *See, e.g. Allen* v. *Wright*, 468 U.S. 737, 766 (1984) (observing "the substantial separation of powers barriers to a suit seeking an injunction to reform administrative procedures"). This concern is preeminent both in considering whether an injunction is warranted in the first instance, and, more pertinent here, whether an existing injunction should be continued or taken down.

1. On numerous occasions, this Court has visited the issue of what level of deference a district court should give to its own earlier equitable decrees after the passage of time. A brief survey of those cases shows a clear trend away from deference to earlier rulings and toward what amounts to *de novo* review based solely on current circumstances.

First, in *United States* v. *Swift & Co.*, 286 U.S. 106 (1932), Justice Cardozo created the so-called "grievous wrong" test for evaluating any request to modify an injunction or consent decree. At its most basic, this standard made it possible – yet extraordinarily difficult – to upset the original intent behind the district court's injunction.

Swift involved an antitrust consent decree entered against the five largest meat packers in the country, all of which promised to refrain from distributing a variety of foods at the retail level. *Id.* at 111. Despite their original assurances, each immediately tried

various tactics to avoid its obligations under the consent decree, including moving to modify the original decree based on alleged changes in the food industry since the original decree had been agreed upon. *Id.* at 112-14. After the then-Supreme Court of the District of Columbia granted the modifications, the United States, joined by various wholesale grocers, appealed. *Id.* at 113-14.

The *Swift* Court determined that a court had inherent power to modify its own decree regardless of whether the decree expressly provided for such modification. *Id.* at 114. Indeed, Justice Cardozo noted that even "[i]f the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need." *Id.*

But while the power existed, it would not be easy to wield. In explicating the standard by which a district court should judge whether changed circumstances merit modification, Justice Cardozo stated:

> We are not at liberty to reverse under the guise of readjusting.... The inquiry for us is whether the changes [in the grocery industry] are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was de-

> creed after years of litigation with the consent of all concerned.

Id. at 119.

This Court substantially modified the *Swift* standard in *Board of Educ. of Oklahoma City Pub. Schs.* v. *Dowell*, 498 U.S. 237 (1991). There the Court considered whether a school district could extricate itself from a district court's busing order if the local authorities had complied with the court's decree for a reasonable amount of time and achieved results. *Id.* at 243. In that case, the district court had found *de jure* segregation and ordered an extensive busing scheme that brought in students from a wide range of diverse residential districts. *Dowell* v. *Bd. of Educ. of the Oklahoma Pub. Schs.*, 338 F. Supp. 1256 (W.D. Okla.), *aff'd*, 465 F.2d 1012 (10th Cir. 1972). The city complied with the so-called "Finger Plan" for five years, achieving substantial desegregation and prompting the district court to terminate its supervision of the school system. *Dowell*, 498 U.S. at 242.

By 1985, however, a group of African-American families challenged the school system's new plan of neighborhood elementary school assignment as a return to segregation and, thus, a violation of the original court-ordered desegregation. *Id.* at 240. The Tenth Circuit ultimately found that, because an injunction remained in effect until a school district could show "grievous wrong evoked by new and unforeseen conditions," something Oklahoma City could not show, the district court should continue administering the school district to ensure no regression in segregation. *Dowell* v. *Bd. of Educ. of the Oklahoma City Pub. Schs.*, 890 F.2d 1483, 1490 (10th Cir. 1989).

This Court reversed. It not only discarded the "grievous wrong" standard, but noted that because desegregation decrees were always intended to be temporary, district court control of school districts should last no longer than absolutely necessary to remedy past wrongs. *Dowell*, 498 U.S. at 248.[2] The Court emphasized that the injunction should merely be transitional, to foster a "transition to a unitary, nonracial system of public education," and that if the school district was being operated in compliance with the law and was unlikely to return to its former ways, no additional showing was required to lift the injunction. *Id.* at 247-48.

A year after *Dowell*, in *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), the Court announced an even more "flexible" standard for evaluating continuing injunctions.

In *Rufo*, a district court had long ago barred Massachusetts officials from using the decaying Charles Street Jail to house prisoners awaiting trial in small, double-bunked cells. The state officials sought modification of the applicable consent decree to permit double-bunking in any event because of a vast increase in the number of prisoners. *Rufo*, 502 U.S. at 376. The district court, applying the pre-*Dowell* "grievous wrong" test, denied the requested relief. *Id.* at 377. The First Circuit affirmed.

---

[2] The *Swift* "grievous wrong" test may still be applicable in situations where the court is being asked to lift a decree while the plaintiff's statutory rights are still being violated. *See Dowell*, 498 U.S. at 247; Sandler & Schoenbrod, *Democracy By Decree*, at 175 n.45 (2002). But this is not the case here.

This Court reversed and remanded for further fact finding. The Court noted the need for "flexibility" in public institutional reform cases such as this where the decree affects not just the parties, but the public as well. *Id.* at 381. The Court found that where unforeseen changes occur in the facts or in the law forming the basis for the decree, "the district court should determine whether the proposed modification is suitably tailored to the changed circumstance." *Id.* at 391. In structuring such revisions, this Court wrote that the district court should bear three principles in mind: (1) the modification must not violate the underlying law; (2) the modification must be narrowly tailored to resolve only the problems created by the changed circumstance; and (3) the district court should defer to local government administrators as much as possible. *Id.* at 391-92.

This Court's most recent refinement of its standard for modifying an injunction came in *Frew* v. *Hawkins*, 540 U.S. 431 (2004). There, a group of mothers of children eligible for a state-administered Medicaid program sued the State of Texas for failing to provide those Medicaid services. In 1993, the district court ruled in their favor, and in 1996, the district court entered a lengthy consent decree compelling the State to comply with the Medicaid law. Two years later, the district court found that the State had violated the decree. The State appealed, arguing that the decree was unenforceable to the extent it exceeded the scope of the Medicaid law it purported to enforce, and that the State was in compliance with the Medicaid law.

This Court found that the decree was enforceable, but that the State was entitled to wide latitude in showing why it should be modified. The Court wrote

that "principles of federalism require that the state officials with front-line responsibility for administering the program be given latitude and substantial discretion." *Frew*, 540 U.S. at 442. The Court noted that a State, unlike a private party, "depends upon successor officials, both appointed and elected, to bring new insights and solutions to problems of allocating revenues and resources," and that those successor officials ought to be given the opportunity to show the wisdom of their new insights. *Id.* The Court thus concluded that, to "ensure that when the objects of the decree have been attained, responsibility for discharging the State's obligations is returned promptly to the State and its officials," a district court should modify its decree "[i]f the State establishes reason" to do so. *Id.*

This standard is effectively *de novo* review, a far cry from the deference to an existing decree embodied in Justice Cardozo's decision in *Swift*.

Bit by bit, this Court has thus moved away from deferring to earlier judicial decrees and toward greater fidelity to the separation of powers principles that guard against judicial intrusion into the political arena. This Court has now recognized that the overriding goal in injunctions and consent decrees issued in institutional reform cases is neither the protection of a district judge's power over implementation of necessary reforms, nor the enforcement of the plaintiff's rights to what she won in the earlier decree.[3]

---

[3] "[O]verly broad consent decrees work an inappropriate shift from judicial protection of the plaintiffs – in their status as rights-holders – to judicial protection of plaintiffs in a new status – as beneficiaries of a contract. . . . This not-so-subtle shift in theory collides with fundamental democratic principles." Sandler & Schoenbrod, "From Status to Contract and Back

Instead, the goal is to return power to local authorities as quickly as possible. *Rufo*, 502 U.S. at 391-92; *Frew*, 540 U.S. at 442.

2. Contrary to that goal, the Ninth Circuit here constructed a particularly onerous burden for modifying the district court's injunction, requiring a showing that "the basic factual premises" of the court's holding had been erased, or that "some *change* in the legal landscape" made the original ruling improper. Pet. App. at 63a. Rather than asking – as *Frew* directs – whether the current set of facts matched the *current* law, the Ninth Circuit asked whether the current set of facts and law matched the facts and law seven years ago. This inappropriately high hurdle, reminiscent of Justice Cardozo's "grievous wrong" test in *Swift*, violates this Court's precedents which have sought a more flexible approach to extricating states from court-imposed injunctions or consent decrees.

Ironically, the Ninth Circuit recognized the substantial progress Arizona and Nogales have made since the Flores litigation began. Pet. App. at 30a. Indeed, the court below admitted that the state had "significantly improved its [LEP] infrastructure" and "increased overall school funding and ... [LEP] program-specific funding." *Id.* It further acknowledged that HB 2064 would "augment" and "further improve" LEP programs statewide and summarized significant changes in education policy and progress state-wide. *Id.* at 30a-34a (describing Arizona's progress in detail).

Again: Consent Decrees in Institutional Reform Litigation," 27 Review of Litigation 115, 115-16 (2007).

Under *Swift*, such progress might have been insufficient to override Justice Cardozo's insistence on deferring to the original decree. But under *Frew*, these findings warrant modification of the injunction and the return of education policymaking to state and local officials. Only this Court can ensure that the principles articulated in *Frew* are respected and applied in this case, as well as other cases arising in the Ninth Circuit.

II. REVIEW IS NEEDED TO GIVE EFFECT TO CONGRESS' MANDATES IN THE NO CHILD LEFT BEHIND ACT

The decision below merits this Court's review for a second and equally important reason: it fails to respect the principles that Congress enacted in the NCLB Act, and in so doing fails to apply NCLB's framework for measuring progress in implementing improvements to Arizona's LEP programs.

1. As previously noted, the district court based its decision to deny petitioners' Rule 60(b)(5) motion on its finding that the per-LEP-student cost of providing adequate LEP instruction is greater than both the State's current fund level and what it proposes to fund under HB 2064. Pet. App. at 149a. The district court focused on per-student LEP funding because that was the yardstick it used in its 2000 order finding the State to be in violation of the EEOA. The district court reasoned that if the basis for the State's liability in 2000 was inadequate per-student LEP spending, the way to measure the State's remediation of that liability was to see if the same spending had subsequently increased to acceptable levels. The Ninth Circuit sustained this approach. Pet. App. at 72a.

But the district court's incremental funding yardstick was conceived in 2000, at a time when Congress had provided no guidance on how to measure a State's compliance with federal LEP requirements. Congress filled that void in 2002 when NCLB became law. Accordingly, courts gauging the sufficiency of an LEP program since the passage of NCLB have now been given a detailed set of measurement tools and may no longer resort to yardsticks of their own making.

2. Because it is undisputed that Arizona's LEP program is presently in full compliance with the measurements mandated by the NCLB, the same program is necessarily also in compliance with the EEOA. To see why that is so, it is necessary to review the EEOA's history.

Congress' purpose in passing the LEP provision of the EEOA in 1974 was to codify certain federal agency guidelines dealing with non-English-speaking students. Those guidelines required school districts with national origin-minority students unable to speak English to "take affirmative steps to rectify the language deficiency in order to open its instructional program to these students." The same regulations had only recently been upheld by this Court in *Lau* v. *Nichols*, 414 U.S. 563, 568 (1974). In keeping with this purpose, the LEP provision of the EEOA simply requires states to "take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. § 1703(f). At that time, however, Congress left unanswered the question of what educational programs would constitute "appropriate action."

Most courts grappling with that question (including the courts below) have tracked the analysis of the Fifth Circuit in *Castaneda* v. *Pickard*, 648 F.2d 989 (5th Cir. 1981). Under the "*Castaneda* test," as it has come to be known, a state's LEP program will be considered "appropriate action" sufficient to satisfy the EEOA where it is:

> [1] informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy;...
>
> [2] reasonably calculated to implement effectively the educational theory adopted by the school; [and
>
> (3) proven], after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome.

Id. at 1009-10.

Here it is undisputed that Arizona's LEP program is based on a well-established educational theory and that the first prong of the *Castaneda* test has thus been satisfied. Accordingly, the decisions below focused primarily on the second and third prongs – whether Arizona devoted sufficient resources to implement its LEP program and whether that program has produced adequate results. And the courts below chose to measure Arizona's progress in these areas by examining the State's LEP funding per student.

In 2000, in the absence of any further guidance from Congress or the appellate courts, the district court's decision to use incremental funding to meas-

ure the adequacy of Arizona's LEP program was not unreasonable. But in 2002, Congress *did* provide further guidance. Congress enacted the No Child Left Behind Act, which featured an entire title mandating LEP programs, and included a detailed set of measurements for determining whether those programs were adequate. It thus makes no sense to assess the adequacy of these programs under a different, judicially created standard.

3. Congress's objectives in passing the LEP provisions of NCLB were identical to its objectives in enacting the EEOA's LEP standard. In both Acts, Congress sought to make sure that LEP students were not being left behind because they lacked English language skills. In the EEOA, this objective was expressed as a desire to eliminate "barriers that impede equal participation" of LEP students (20 U.S.C. § 1703(f)). In NCLB, Congress wrote that its purpose was "to assist all limited English proficient children, including immigrant children and youth, to achieve at high levels in the core academic subjects so that those children can meet the same challenging State academic content and student academic achievement standards as all children are expected to meet" (20 U.S.C. § 6812(2)).

Similarly, the EEOA leaves "educators and public officials charged with responsibility for directing the educational policy of a school system" with the task of "choosing between sound but competing theories," so long as those theories are "recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy." *Castaneda*, 648 F.2d at 1009. Likewise, NCLB "provide[s] State educational agencies and local educational agencies with the flexibility to implement language instruction edu-

cational programs, based on scientifically based research on teaching limited English proficient children, that the *agencies* believe to be the most effective for teaching English" (20 U.S.C. § 6812(9)) (emphasis added).

But while the ends of the EEOA and NCLB are the same, only NCLB spells out the means of achieving them. The EEOA – even with the interpretive assistance of *Castaneda* – offers only vague mandates as to how to comply with its goals, requiring "programs and practices ... reasonably calculated to implement effectively the educational theory adopted by the school." *Castaneda*, 648 F.2d at 1010.

NCLB, on the other hand, contains a lengthy list of "required" activities which school districts "shall" provide to implement LEP programs, as well as a list of "authorized" activities which school districts "may" provide. *See* 20 U.S.C. §§ 6825(c), (d). These activities include, for example, "provid[ing] high-quality professional development to teachers, principals and other school personnel," "identifying, acquiring, and upgrading curricula, instruction materials, educational software, and assessment procedures," and "providing tutorials and academic or vocational education for limited English proficient children." *Id.*

Similarly, NCLB contains far more precise guidance on how to measure a state's success in implementing the required programs. Whereas EEOA compliance under *Castaneda* vaguely tests whether an LEP program "fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome" (*Castaneda*, 648 F.2d at 1010), NCLB ex-

pressly requires states to develop "annual measurable achievement objectives for limited English proficient children." 20 U.S.C. § 6842. These objectives must, at a minimum, include annual increases in the number or percentage of children making progress in learning English, annual increases in the number or percentage of children attaining English proficiency by the end of each school year, and adequate yearly progress in achieving benchmarks applicable to all (including non-LEP) students generally. *Id.*

The detailed requirements of NCLB were a deliberate departure from the vague pronouncements of the EEOA. Such detail would have been wholly unnecessary had Congress been satisfied with the then-existing judge-made minimum standards of the EEOA. In passing NCLB, Congress perceived a failure in LEP education, and spoke clearly in announcing what states needed to do to improve.

4. By contrast, the decision below rested on the faulty conclusion that the EEOA and NCLB, despite having similar objectives, proceeded on two different tracks, and that NCLB compliance, despite being more strictly defined, did not necessarily entail EEOA compliance. As the Ninth Circuit expressed it, the EEOA is "an equality-based civil rights statute," whereas NCLB is "a program for overall, gradual school improvement." Pet. App. at 72a-73a. "The EEOA's concerns, in other words, lie fundamentally with the current rights of individual students, while NCLB seeks gradually to improve their schools." Pet. App. at 75a.

On this point, then, the principal flaw in the Ninth Circuit's reasoning is that it ignores the fact that the district court chose to remedy the EEOA vio-

lations it found by mandating its *own* program of "gradual school improvement" even though Congress in the NCLB has now mapped out a different method for achieving such gradual improvement. Even if the Ninth Circuit is correct that the two statutes look to different time frames and *can*, in the abstract, have different remedies – that is, that an EEOA violation can occur today and can be enforced by a private right of action whereas an NCLB violation can only happen after years of missed objectives and cannot be enforced by a private right of action – in this case, the remedy the district court chose is squarely addressed and rejected by the text of NCLB.

The Ninth Circuit also erred in overstating the claimed conflict between the statutes. Contrary to the Ninth Circuit, it was not necessary to consider whether NCLB "repealed" the EEOA, or even superseded its liability rule. This Court has repeatedly held that a judicial interpretation of an earlier statute may be supplanted by a later statute without "repealing" the earlier statute. *See United States* v. *Fausto*, 484 U.S. 439, 453 (1988); *Vermont Agency of Natural Res.* v. *U.S. ex rel. Stevens*, 529 U.S. 765, 786 n.17 (2000) ("it is well established that a court can, and should, interpret the text of one statute in the light of text of surrounding statutes, even those subsequently enacted"); *Food & Drug Admin.* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand").

All that was at issue here was whether NCLB affected the particular remedy imposed by the district court in this case. That remedy required the State to

formulate and implement programs to improve the quality of its LEP instruction over a multi-year period, and to measure their success. At the time it was fashioned, in the absence of any guidance from Congress, the district court's remedy was a reasonable interpretation of the EEOA's requirements. But in 2002, Congress spelled out at length what LEP programs must include, how they should be improved, and how to measure those improvements. Judicial guesswork as to how to carry out Congress's will was no longer needed or appropriate.

CONCLUSION

In insisting on compliance with its *own* criteria for measuring the adequacy of Arizona's LEP program, the district court not only usurped the power of the Arizona Legislature to regulate traditional state functions, but also usurped the power of Congress to mandate its own carefully-considered policies. Review is needed to restore control of Arizona's schools to its voters and to give effect to Congress' mandate in NCLB. The petition for a writ of certiorari should be granted.

Respectfully submitted.

DANIEL J. POPEO
RICHARD A. SAMP
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

GENE C. SCHAERR
Counsel of Record
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006
(202) 282-5000

PROF. ROSS SANDLER
PROF. DAVID SCHOENBROD
New York Law School
57 Worth Street
New York, NY
(212) 431-2100

MICHAEL J. FRIEDMAN
ARI E. WALDMAN
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166
(212) 294-6700

Counsel for Amicus Curiae

OCTOBER 2008

JOINT APPENDIX

120 (10)

Supreme Court, U.S.
FILED
FEB 23 2009
OFFICE OF THE CLERK

No. 08-294
(consolidated with No. 08-289)

In the
Supreme Court of the United States

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES and PRESIDENT OF THE ARIZONA SENATE,

PETITIONERS,

v.

MIRIAM FLORES, individually and as parent of Miriam Flores, minor child; ROSA RZESLAWSKI, individually and as parent of Mario Rzeslawski, minor child; STATE OF ARIZONA and the ARIZONA STATE BOARD OF EDUCATION, and its members in their official capacities,

RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

RICK RICHMOND
CHRISTOPHER C. CHIOU
STEVEN A. HASKINS
KYLE T. CUTTS
KIRKLAND & ELLIS LLP
777 South Figueroa Street
Los Angeles, CA 90017
(213) 680-8400

DAVID J. CANTELME
D. AARON BROWN
PAUL R. NEIL
CANTELME & BROWN, PLC
3030 N. Central Avenue
Phoenix, AZ 85012
(602) 200-0104

KENNETH W. STARR
Counsel of Record
KIRKLAND & ELLIS LLP
777 South Figueroa Street
Los Angeles, CA 90017
(213) 680-8400

ASHLEY C. PARRISH
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Counsel for Petitioners

February 23, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Doc 4
TOC 4CI2QB

TABLE OF APPENDICES

Appendix A — Second Amended Complaint (For Declaratory and Injunctive Relief) Dated and Filed November 27, 1996 1

Appendix B — Consent Order of the United States District Court for the District of Arizona Dated and Filed Dated and Filed June 30, 2000 19

Appendix C — Order of the United States District Court for the District of Arizona Dated and Filed October 12, 2000 31

Appendix D — Order of the United States District Court for the District of Arizona Dated June 25, 2001 and Filed June 28, 2001 41

Appendix E — Order of the United States District Court for the District of Arizona Dated April 5, 2002 and Filed April 8, 2002 46

Appendix F — Order of the United States District Court for the District of Arizona Dated June 7, 2002 and Filed June 12, 2002 53

Appendix G — Motion to Intervene of Speaker of the Arizona House of Representatives and President of the Arizona Senate Dated and Filed March 7, 2006; Exhibit 1 to Motion to Intervene of Speaker of the Arizona House of Representatives and President of the Arizona Senate Dated and Filed March 7, 2006; and Resolutions authorizing the Speaker of the Arizona House of Representatives and President of the Arizona Senate to represent the Arizona Legislature 55

Appendix H — Order of the United States District Court for the District of Arizona Dated and Filed October 10, 2007 86

Appendix I — Selected Excerpts of Testimony of Karen Butterfield, Kelt Cooper, Thomas Fagan, Margaret Garcia-Dugan, Irene Moreno, Rosalie Porter, Karla Soto, Richard Valdivia, Sharron Walker, and Guillermo Zamudio 92

Appendix J — Selected Excerpts of Exhibits from Evidentiary Hearing Held by the United States District Court for the District of Arizona 230

Appendix K — Selected Excerpts of Testimony of Kelt Cooper, Eugene Dudo, Irene Moreno, and Guillermo Zamudio 377

Appendix L — Order of the United States District Court for the District of Arizona Dated January 24, 2005 and Filed January 28, 2005 386

Appendix A

Timothy M. Hogan, (0045S7)
David S. Baron (005574)
ARIZONA CENTER FOR LAW
IN THE PUBLIC INTEREST
202 E. McDowell Rd., Ste 153
Phoenix, Arizona 85004
(602) 258-8850

Counsel for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MIRIAM FLORES, individually and and as a parent of Miriam Flores, minor child, and ROSA RZESLAWSKI, individually and as a parent of Mario Rzeslawski, minor child, on behalf of themselves and all others similarly situated, Plaintiffs, v. THE STATE OF ARIZONA; C. DIANE BISHOP, Superintendent of Public Instruction, DR.	No. CIV 92-596 TUC-ACM SECOND AMENDED COMPLAINT (For Declaratory and Injunctive Relief)

Appendix A

EUGENE HUGHES, DAVID SILVA,
CLAUDINE BATES ARTHUR, DR.
JOHN HOSNER, KEN BENNETT,
DR. RAY KELLIS, JIM ALLMAN,
and DR. MORRISON WARREN, members of the STATE BOARD OF EDUCATION,

Defendants.

For their Second Amended Complaint in the above-entitled action, Plaintiffs hereby allege that:

I.
PRELIMINARY STATEMENT

1. This is a class action for declaratory and injunctive relief. Plaintiffs allege that all Defendants have violated 20 U.S.C. §1703(f) in their oversight, administration and funding of federally mandated instruction for limited English proficient ("LEP") students enrolled in the Arizona public school system. Plaintiffs further allege that all Defendants, other than the State, have violated the regulations (34 C.F.R. Part 100) implementing Title VI of the 1964 Civil Rights Act (42 U.S.C. §2000d), not only in the foregoing respects, but in their supervision of and support for basic instruction of minority students substantially concentrated in

comparatively poor school districts, such as Nogales Unified, thereby denying those Hispanic, Black and Native American children equal educational benefits and opportunities.

II.
JURISDICTION

2. To the extent the instant action arises under a federal statute (20 U.S.C. §1703(f)) and regulations (34 C.F.R. Part 100) securing the civil rights of racial or ethnic minorities and is therefore maintainable against all Defendants, except the State, pursuant to 42 U.S.C. §1983, 28 U.S.C. §1343 grants this court jurisdiction over the subject matter.

3. Subject matter jurisdiction, extending to all claims against all Defendants, is otherwise conferred on the court by 28 U.S.C. §1331(a), since the action presents controlling questions of federal law and seeks final declaratory as well as equitable relief.

4. Pursuant to 42 U.S.C. §2000d-7, the Defendant State of Arizona is not entitled to assert immunity from suit under the Eleventh Amendment to the United States Constitution where, as here, equitable remedies are sought for State violations of such statutes as 20 U.S.C. §1703(f).

III.
PLAINTIFFS

5. Plaintiff Miriam Flores is the mother of a daughter also named Miriam Flores. The daughter Miriam attends Coronado Elementary School, a

school maintained and operated by Nogales Unified School district No. 1. ("NUSD").

6. Plaintiff Rosa Rzeslawski is the mother of Mario Rzeslawski. Mario attends Nogales High School, a school maintained and operated by NUSD.

IV.
DEFENDANTS

7. The Defendant State of Arizona is one of the fifty states of the United States of America.

8. Plaintiffs sue the State solely for violations of 20 U.S.C. §1703(f) alleged in Count One of this Complaint.

9. The remaining Defendants are the members of the State Board of Education and the Superintendent of Public Instruction (hereafter, "the Defendant officials").

10. Plaintiffs sue the defendant officials, in their capacities as such, for the violations of 20 U.S.C. §1703(f) and 34 C.F.R. Part 100 set forth in Count One and for the violations of 34 C.F.R. Part 100 separately pled in Count Two. The aforesaid regulations are applicable to the subject matter because the State's program of public instruction annually receives and spends millions of dollars in federal financial assistance.

V.
CLASS ACTION

11. Plaintiffs Miriam Flores and Rosa Rzeslawski bring this action on behalf of themselves;

their children, Miriam Flores and Mario Rzeslawski respectively; and all Hispanic, Native American and Black children now or hereafter enrolled in NUSD, as well as the parents and guardians of those students.

12. According to official records maintained by the Arizona Department of Education ("ADOE"), the current, fulltime enrollment of minority students, as aforesaid, exceeds several thousand in NUSD.

13. The contemporary membership of the class is therefore sufficiently numerous to render joinder impracticable, as required by Fed. Rules of Civ. Pro., Rule 23(a)(1).

14. Questions of law and fact common to the classes exist, as shown by the allegations of paragraphs 19-52, which are incorporated herein for the purpose of this averment and Rule 23(a)(2).

15. The claims of the named Plaintiffs are typical of those urged on behalf of the putative classes: the minor Plaintiffs remain fulltime students in the Nogales school district and, therefore, subject to the systemic practices at issue similarly harming the educational interests of all other minority enrollees, as set forth in paragraphs 19-52. Plaintiffs also incorporate those allegations for purposes of this averment and Rule 23(a)(3).

16. Plaintiffs will fairly and adequately represent the interests of absent class members:

(a) The named, adult representatives are parents of minority children, with a continuing, vital interest in the education provided their offspring by NUSD.

(b) The proposed class representatives have no interests antagonistic to those of absentees, on whose behalf they seek the same relief that they request individually, pursuant to the same remedial theories.

(c) Plaintiffs are represented by counsel versed in the subject matter of the instant action and otherwise competent to prosecute it on behalf of the proposed classes.

17. As set forth in paragraphs 19-52, the state and the individual Defendants have acted and failed to act on grounds generally applicable to both classes, thereby making declaratory and final injunctive relief appropriate with respect to the membership as a whole.

18. This Court may, therefore, certify the proposed classes pursuant to Rule 23(a) and (b)(2).

VI.
COUNT ONE

Violations of Federal Law Requiring Maintenance of Educationally Sound, Sufficiently Supported and Properly Conducted Programs for Limited English Proficient Children

A. Respects in which all Defendants have Failed to Comply with Federal Law, in Providing for Instructional Programs Required by Limited English Proficient Students throughout the State's Public School System

19. The State has adopted legislation (A.R.S. §15-751 et. seq.) generally prescribing a program of

instruction for LEP students that if adequately implemented, would satisfy, the educational mandates of 20 U.S.C. §1703(f) and 34 C.F.R. Part 100.

20. The State has failed to provide financial and other resources necessary for adequate implementation of mandatory LEP programs by public school districts in Arizona:

(a) The cost of LEP instruction complying with federally prescribed state mandates far exceeds the only financial assistance the State theoretically provides school districts for such purposes.

(b) The State's population of LEP students is concentrated in districts, such as NUSD, that otherwise confront exceptional demands on resources of all kinds, due to the prevalence of low-income minority students peculiarly at risk of not acquiring State-prescribed essential skills, not satisfactorily completing State-mandated academic courses and not graduating from high school.

(c) Those school districts therefore are unable to underwrite LEP programs complying with federally prescribed State mandates; meet State requirements determining satisfactory Instruction of all mainstream students; and also discharge responsibilities for pupils in Special Education programs required by federal and state law.

(d) Defendants have allowed a number of districts, including NUSD, to forego or substantially neglect identification, testing, placement, instruction, assessment and reclassification of LEP students as federal law requires.

(e) Defendants' aforementioned omissions in part are deliberate and otherwise arise from a pronounced shortage of ADOE staff capable of monitoring and enforcing compliance by districts with legal mandates binding on LEP programs throughout the State.

(f) Defendants have permitted unendorsed or otherwise unqualified faculty to conduct bilingual and ESL classes enrolling thousands of LEP students, who do not receive instruction satisfying federal prescriptions on the design, curricular content and objectives, and instructional methodology of acceptable LEP programs.

(g) Defendants have allowed districts to maintain LEP programs that also lack texts and other resources necessary to impart content-area knowledge to limited English proficient children, in derogation of the State's minimum curricular requirements governing matriculation of all students not in certain Special Education programs.

(h) Defendants have permitted districts to reclassify LEP students as proficient in comprehending, speaking, reading and writing English, even though they demonstrably lack English reading skills commensurate with their ages and grade levels, and therefore cannot acquire State-prescribed essential skills in academic subjects subsequently taught them in English-only classes, unaccompanied by any endeavor sufficient to rectify either English literacy or essential skills deficits.

B. Nogales Unified School District

21. Miriam Flores and Mario Rzeslawski are limited English proficient Hispanic students who have matriculated through several, different grade levels in NUSD schools.

22. In May of 1993, the Office of Civil Rights, U.S. Department of Education ("OCR") issued a letter of findings in its recent investigation of alleged noncompliance by NUSD with the Civil Rights Act of 1994, 42 U.S.C. § 2000d, and its implementing regulations, 34 C.F.R. Part 100.

23. OCR then concluded that NUSD has systematically violated 34 C.F.R. Part 100, by consistently failing to identify and test LEP students in the fourth through twelfth grades, failing to provide them any programs of instruction complying with federal mandates; engaging in a pattern and practice of placing such children solely in English-only classes; failing to recruit faculty qualified to teach bilingual and/or ESL classes; and failing to take similar action required by federal law.

24. Defendants' agents were aware of the longstanding, systemic violations of 34 C.F.R. Part 100, set forth in the May, 1993 OCR letter, but never attempted to adequately enforce and were not directed by defendants to so enforce state laws and regulations prohibiting the same acts and omissions, in furtherance of federal mandates on instruction for LEP students.

25. Through very recent identification and testing, NUSD staff have determined that over two-thirds of the entire district enrollment of approximately 6700 students are limited English proficient and require placement in programs

satisfying federal, as well as complementary state, standards.

26. Due to protracted neglect of those students' basic instructional needs, LEP programs sufficient to rectify a pervasive lack of English literacy and other State-prescribed essential skills require properly trained professionals, reduced class sizes, specialized curricular materials and additional resources far beyond the means of NUSD, which spends less per student than practically any district in the state notwithstanding representative rates for local taxation.

27. LEP programs in NUSD will remain out of compliance with federal law and regulations, absent assistance from defendants that has never been forthcoming, despite their ultimate, legal responsibility for provision of instruction and related educational services satisfying the mandates of 20 U.S.C. §1703(f) and 34 C.F.R. Part 100.

C. Claim for Relief

28. Defendants systematically have failed or refused to provide fiscal as well as other resources sufficient to enable NUSD and similarly situated districts to establish and maintain programs serving LEP students in conformity with the mandates of 20 U.S.C. §1703(f) and 34 C.F.R. Part 100.

29. Defendants otherwise have allowed and effectively encouraged such districts to persevere in a pattern and practice of violating the substantive requirements of those federal laws.

30. Plaintiffs' minor children are among the LEP students subjected to the aforementioned, unlawful acts and omissions, which operate throughout their district and others like it to deny those pupils the rights, educational benefits and educational opportunities guaranteed them by 20 U.S.C. §1703(f) and 34 C.F.R. Part 100.

31. Plaintiffs and the proposed classes are entitled to injunctive relief from the continuing violations of federal law, by all defendants, set out in Count One.

VII.
DENIAL OF EQUAL EDUCATION BENEFITS AND OPPORTUNITIES. IN THE FORM OF STATE-PRESCRIBED ESSENTIAL SKILLS, TO AT-RISK MINORITY STUDENTS

A. Respects in which the Defeat Officials are Accountable for the Aforementioned Violations of 34 C.F.R, part 100

32. The defendant officials have issued regulations and directives setting forth the essential skills in reading, mathematics and writing that all mainstream students in the Arizona public schools are expected to master, before matriculating from the eighth grade and graduating from high school.

33. These "minimum competency requirements," or State-prescribed "essential skills," constitute the minimum educational benefits that public instruction must afford to all students not in certain Special Education programs.

34. The defendant officials are aware that relative to their peers in less impoverished and substantially minority districts, decidedly disproportionate members of students n predominantly minority districts fail to acquire State-prescribed essential skills, on which all other educational benefits and opportunities depend.

35. Even if the LEP population in the latter districts are taken into account, the aforementioned disparity in provision of fundamental educational benefits still remains.

36. The defendant officials have not directed ADOE staff to determine whether core curricula and their delivery in predominantly minority districts are at all calculated to impart State-mandated essential skills or to oversee necessary improvements, even though the State Board and Superintendent are aware that the content of instruction in high "at-risk"/minority districts does not fit the State's principal measures of essential skill acquisition by elementary and middle school students.

37. The defendant officials instead have allowed districts to devise their own, individual criteria for determining whether their enrollees have mastered the same State-prescribed essential skills required of all mainstream students throughout the Arizona public school system.

38. Predominantly minority districts are, therefore, permitted to report that most of their students have met minimum competency requirements, when in fact, a majority have not acquired State-prescribed essential skills, according to standards otherwise in use by the State, by

districts serving less impoverished, minority enrollments and by predominantly minority districts themselves.

39. In addition to maintaining above-average LEP enrollments, predominantly minority districts must serve disproportionate members of children at risk of academic failure, due to conditions in families, schools and communities that are not present, to any similar extent, in less impoverished, predominantly Anglo districts.

40. Predominantly minority districts, including NUSD, therefore confront inherent and profound disadvantages, vis-à-vis less distressed, non-minority districts, in trying to impart State-mandated essential skills, especially while simultaneously striving to meet federal and state standards on far more extensive LEP programs; maintain larger and more elaborate remedial or compensatory programs; sustain more extensive dropout prevention efforts; operate physical plants in much poorer condition; and satisfy other legal as well as educational demands that do not tax the resources of less impoverished, majority districts in the same ways or, especially, to the same degree.

41. Under all the aforementioned conditions, which are known to the defendant officials, predominantly minority districts cannot impart State-prescribed essential skills to even a bare majority of their mainstream students, as do less impoverished, majority districts, without additional resources sufficient to overcome exceptional obstacles peculiarly burdening their efforts to fulfill State mandates.

42. The defendant officials administer a state school finance system that not only operates to deprive predominantly minority districts of the means to comply with federal and complementary state prescriptions on LEP instruction, but serve to provide less distressed, predominantly Anglo districts with access to and use of more adequate resources for imparting state-prescribed essential skills than are available to predominantly minority districts, which also remain unable to furnish equal educational benefits and opportunities dependent on satisfaction of the State's minimum competency requirements.

B. Nogales Unified School District

43. The NUSD enrollment is overwhelmingly minority, substantially limited English proficient and similarly lacking in State-mandated essential skills, according to measures regularly employed by the defendant officials and ADOE professional staff.

44. The NUSD enrollment continues to post high scores, relative to state averages, on both individual and composite at-risk measures. These indices accurately reflect socio-economic conditions inimical to acquisition of State-required essential skills and of such contingent educational benefits as graduation from high school and satisfactory completion of academic coursework qualifying students for admission to the State's universities.

45. In the case of NUSD, the defendant officials are chargeable with the omissions and acts summarized in paragraphs 32-42, supra.

46. Although NUSD maintains a local taxing effort comparable to that of other districts with enrollments of similar size, it has succeeded only in maintaining among the lowest per pupil expenditure levels in the State.

47. NUSD substantially lacks the means to impart State-mandated essential skills to a mainstream enrollment with the salient characteristics consistently cited in DOE "at-risk" reports and summarized in Count One as well as Count Two of this Second Amended Complaint.

48. NUSD has not received and under the state school finance scheme administered by the defendant officials, cannot or will not receive resources enabling the district to provide such a minority student body with State-prescribed essential skills, as predominantly Anglo districts of equivalent or greater size generally are able to do, in benefiting from and making effective use of the same fiscal provisions.

C. Claim for Relief

49. The children of the named plaintiffs are limited English proficient, Hispanic, at risk students, and continuing to attend NUSD schools, subject to the acts, omissions, patterns and practices set forth in Count Two, with the result that they lack State-mandated essential skills.

50. The defendant officials consistently have failed to monitor or prescribe improvements in instruction provided by predominantly minority school districts, including - among others - NUSD, to

ensure that curricular content and its delivery are at least calculated to impart State-prescribed essential skills, as is the instruction generally afforded in predominantly Anglo districts, according to the measures and indicators regularly used by the ADOE.

51. The defendant officials administer a school finance scheme that is just sufficient to let less distressed, predominantly Anglo districts impart State-mandated essential skills to their mainstream student bodies, while providing them with some additional, basic educational benefits and opportunities mentioned in this Count, but that does not and will not enable NUSD or similarly situated districts to impart the same State-mandated essential skills to decisively minority enrollments requiring expanded compensatory programs, smaller class sizes and further efforts of like nature in order to acquire them.

52. The defendant officials have adopted methods of administering the State's program of public instruction that have the effect of disproportionately denying these minority children fundamental educational benefits, declared such and mandated for all public school children by the State itself, thus violating 34 C.F.R. Part 100 in respects entitling plaintiffs and the plaintiff classes to permanent injunctive relief vindicating their rights under federal law.

WHEREFORE, plaintiffs respectfully request that the Court:

1. Assume jurisdiction of this action.

2. Certify the class described in paragraph 11, pursuant to Rule 23(a) and (b)(2).

3. Enter a declaratory judgment determining that the acts, omissions, patterns and practices underlying the foregoing claims for relief violate 34 C.F.R. Part 100 and, as applicable, 20 U.S.C. §1703(f).

4. Grant such preliminary and permanent injunctions, prohibitive or affirmative, as may be necessary to effectuate its declaratory judgment and to protect the rights of plaintiffs and all other class members under 20 U.S.C; §1703(f) and 34 C.F.R. Part 100.

5. Grant plaintiffs their reasonable costs of litigation, including their attorneys' and expert witness fees;

6. Grant such other and further relief as the Court deems just and proper in the premises.

DATED this 27 day of November 1996.
ARIZONA CENTER FOR LAW
IN THE PUBLIC INTEREST

By/s/ David S. Baron
Timothy M. Hogan
David S. Baron
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed first class mail, postage prepaid, this 27 day of November 1996 to:

Appendix A

Ruth Koester, Esq.
Assistant Attorney General
Administrative Law Section
1275 W. Washington
Phoenix, AZ 85007

By/s/ David S. Baron

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MIRIAM FLORES, individually and as a parent of Miriam Flores, minor child, et al., Plaintiffs, v. STATE OF ARIZONA; et al., Defendants.	CIV 92-596 TUC ACM CONSENT ORDER

In order to settle certain issues without need for a trial, the parties to this action, by and through their counsel undersigned, hereby enter into this Consent Order.

I. LEP DETERMINATION CRITERIA

A. Pursuant to Arizona Revised Statutes ("A.R.S.") § 15-756(7), the Superintendent of Public Instruction (the "Superintendent") is charged with the selection of a list of tests and the setting of test scores to determine whether a child is limited English proficient ("LEP")- The Superintendent shall carry out this mandate before July 1, 2000. The test scores adopted by the Superintendent as indicating English language proficiency, shall be based on the test vendors' cut scores for each test included on the list prepared pursuant to A.R.S. § 15-756(7).

B. After the list of tests has been compiled and the scores determined, the Superintendent shall distribute that information, as well as any additional explanatory materials that the Superintendent deems necessary, to all school districts and charter schools in the state. The Superintendent shall also designate individuals within the Department of Education (the "Department") as contacts regarding the tests, in the event school districts or charter schools need further information or assistance.

II. PERFORMANCE STANDARDS

A. Duties of the State Board of Education.

The State Board of Education (the "State Board" or the "Board") shall amend its existing rules regarding bilingual education and English as a second language ("ESL") instruction, or enact new rules, that effectuate the following policies:

1. After a student is exited from a Lau program, that exited student shall be reassessed in each of the two years following the student's exit.[1]

---

[1] *Law v. Nichols*, 414 U.S. 563 (1974), requires that school districts provide LEP students with a program of instruction calculated to make them proficient in speaking, understanding, reading, and writing English so that they can achieve the same academic standards required of all other students. Programs that are operated pursuant to the mandate of the *Lau* case are referred to as "*Lau* programs."

2. The reassessment shall consist of tests of the exited student's reading and writing skills, math skills and mastery of academic content areas.
3. The exited student's scores on the reassessment tests shall be compared to the scores of other students of the same age or grade level within the state to determine whether the student is performing at a satisfactory level.
4. In reassessing an exited student's math skills and content area mastery, a school district may use either the regularly administered Arizona Instrument to Measure Standards (the "AIMS Test") or the Stanford 9 Test.
5. In reassessing an exited student's reading and writing skills, a school district may use any of the tests identified by the Superintendent pursuant to A.R.S. § 15-756(7), or it may use any of the tests (if any) identified by the Superintendent pursuant to Section II. B, below.
6. The determination of whether an exited student has performed satisfactorily on the reassessment tests shall be based on the following:
a. If one of the tests selected by the Superintendent pursuant to A.R.S. § 15-756(7) is used as a reassessment test, a student must score at or above the proficiency score established by the Superintendent for that test.
b. If the Stanford 9 Test is used as a reassessment test for math skills and content area mastery, a student must score at or above the proficiency score established by the Superintendent for that test in connection with her responsibilities pursuant to A.R.S. § 15-756(7).

c. If the AIMS test is used as a reassessment test for math skills and content area mastery, a student must meet or exceed the minimum competency standards adopted by the Board pursuant to A.R.S. § 15-203 (the "Board's Academic Standards").
d. If a test selected by the Superintendent pursuant to Section II.B of this Order is used as a reassessment test for reading and writing skills, a student must score at or above the proficiency score established by the Superintendent for that test.
7. Exited students who do not perform satisfactorily on the reassessment tests in the two years following their exit from a Lau program shall, subject to parental consent, be re-enrolled in a Lau program and/or given compensatory instruction aimed at curing the skill or knowledge deficits revealed by the reassessment results.
8. "Compensatory instruction" may include individual or small group instruction, extended day classes, summer school and intersession school.
9. The State Board shall adopt the rules described in this section before December 31, 2000.

B. <u>Duties of the Superintendent.</u>

1. If, after consultation with the testing company that prepared the test at issue, the Superintendent determines that a test for reading and writing assessment selected by the Superintendent pursuant to A.R.S. § 15-756(7) may also be used for reassessment of exited students, such test may be used for reassessment of a student. If such tests are used for reassessment, the test scores used to

determine a student's current English proficiency shall not be lower than the test scores used to initially determine whether the child was LEP.

2. If, after consultation with the testing company, the Superintendent determines that the tests selected pursuant to A.R.S. § 15-756(7) for reading and writing assessment cannot be used for reassessment of exited students, the Superintendent shall select a list of tests that can be used by school districts and charter schools for reading and writing reassessment of students who have been exited from Lau programs. The Superintendent shall also determine the acceptable score for each of the selected tests. An "acceptable score" shall at least be equivalent to the score that would have indicated initially that the student was not LEP, The Superintendent shall create the reassessment test list, if necessary, and determine the required test scores prior to December 31, 2000.

III. ENGLISH LANGUAGE INSTRUCTION

The State Board shall amend its existing rules regarding bilingual education and ESL instruction, or enact new rules, that require the following:

A. Daily instruction in English language development. The English language instruction shall be appropriate to the level of English proficiency and shall include listening and speaking skills, reading and writing skills, and cognitive and academic development in English.

B. Daily instruction in basic subject areas that is understandable and appropriate to the level of academic achievement of the LEP student, and is in conformity with accepted strategies for teaching LEP students.
C. The curriculum of all bilingual education and ESL programs shall incorporate the Board's Academic Standards and shall be comparable in amount, scope, and quality to that provided to English proficient students.
D. The State Board shall adopt the rules described in this section before December 31, 2000.

IV. LEP INDIVIDUAL EDUCATION PLANS

The State Board shall amend its existing rules regarding bilingual education and ESL instruction, or enact new rules, to include the following:
A. On request of a parent or legal guardian with regard to that parent or legal guardian's own LEP student, the principal of the student's school shall require a meeting with the principal or principal's designee, the parent or legal guardian, and the classroom teacher to review the student's progress in achieving proficiency in the English language or in making progress toward the Board's Academic Standards and to make modifications to the student's instruction in order to address identified problems.
B. LEP students who are not progressing toward achieving proficiency of the Board's Academic Standards, as evidenced by failure to improve scores on tests conducted pursuant to A.R.S. §§ 15-741(A)(2) and (3), shall be provided additional compensatory

instruction to help them achieve those academic standards.

C. The modifications to a student's instruction described in Section IV.A of this Order and the compensatory instruction described in Section V. shall be provided in the form of an Individual Education Plan ("IEP").

D. IEPs shall also be provided to students (1) whose school has too few LEP students at a given grade level to require maintenance of a regular bilingual education program or ESL program for that grade level, or (2) whose parents or legal guardians withhold consent to place a student in a regular Lau program.

E. An IEP required by Section IV.D shall be prepared by an IEP team comprised of the school principal or the principal's designee, one of the student's academic subject teachers, the student's Lau program teacher or another certified teacher who has a bilingual education of ESL endorsement, and the parent(s) or legal guardian(s), unless they decide not to participate in the IEP team. If the parent(s) or legal guardian(s) so desire, the IEP team shall also include one advocate for the student selected by the student's parent(s) or legal guardian(s) and/or the student.

F. The IEP team shall determine the scope and/or type of services the student will need to become proficient in English. The curriculum of all IEPs required by Section IV.D shall incorporate the academic standards adopted by the Board pursuant to A.R.S. § 15-701 and shall be comparable in

amount, scope, and quality to that provided to English proficient students.

G. Upon request by the Department, a copy of the IEP shall be submitted to the Department, along with a summary of the student's progress, including academic gain as measured by the AIMS Test, the Stanford 9 Test, or other school assessments for use in the Department's annual English Acquisition Report to the Legislature.

H. The IEP is not required to be implemented by a classroom teacher who possesses a basic or standard certificate to teach and a bilingual or ESL endorsement, and may be implemented by any certificated teacher. In the latter circumstance, however, a teacher who possesses a basic or standard certificate to teach and a bilingual or ESL endorsement shall collaborate with the classroom teacher in the implementation of the IEP, including documentation of periodic reviews of the student's progress toward English proficiency and content area knowledge, as well as plans to remedy any lack of progress.

I. The State Board shall adopt the rules described in this section before December 31, 2000.

V. MONITORING

A. Duties of the State Board.

The State Board shall amend its existing rules regarding bilingual education and ESL instruction, or enact new rules, to include the following:

Appendix B

1. If the monitoring report described in Section V.B of this Order indicates that a school district or charter school is not in compliance with state or federal laws regarding LEP students, the district or charter school shall submit a corrective action plan to the Department within sixty days from the date of the report.
2. The State Board shall adopt the rules described in this section before December 31,2000.

B. Duties of the Superintendent.

1. The Superintendent shall direct the Department to monitor each year at least twelve school districts or charter schools from the fifty school districts or charter schools in this State with the highest number of LEP students. The Department shall monitor all fifty school districts or charter schools with the highest number of LEP students in the State at least once every four years.
2. The Superintendent shall direct the Department to monitor each year at least ten school districts or charter schools that are not included in the fifty described in Section V.B.I of this Order.
3. The Superintendent shall direct the Department to monitor each year at least ten school districts or charter schools that, pursuant to A.R.S. § 15-754, "are not required to provide bilingual education programs or ESL programs for a majority of their grade levels.
4. The school districts and charter schools described in the previous Sections V.B.1., 2., and 3. of this Order shall be chosen in the Department's sole

discretion based upon the Department's review of the reports submitted pursuant to A.R.S. § 15-755.

5. In addition, the Department shall monitor of any school district or charter school if the Department receives a documented, written complaint from any citizen, or a complaint from the United States Department of Education or from the United States Office of Civil Rights regarding a district's or charter school's compliance with state or federal law regarding LEP students.

6. The monitoring required by this Section V shall be on-site monitoring and shall include classroom observations, curriculum reviews, faculty interviews, student records, and a review of LEP programs. The Department may use bilingual education or ESL endorsed personnel from other schools to assist with the monitoring.

7. Based on the results of its monitoring, the Department shall determine whether or not the school district or charter school is complying with state and federal laws applicable to LEP students.

8. The Department shall issue a report on the results of its monitoring within forty-five days after completing the monitoring.

9. Within sixty days following the issuance of the Department's report, the district or charter school receiving the report shall prepare and submit to the Department a corrective action plan that sets forth steps that will be taken: to correct the deficiencies (if any) noted in the Department's report.

10. Within thirty days after its receipt of a district's or charter school's corrective action plan, the Department shall review such corrective action plan,

and may require changes to the corrective action plan.

11. After the Department has reviewed a district's or charter school's corrective action plan and has made any changes it determines are necessary, the corrective action plan shall be returned to the district or charter school.

12. Within thirty days after receiving its corrective action plan back from the Department, the district or charter school shall begin implementing the measures set forth in its corrective action plan.

13. The Department shall conduct a follow-up evaluation of the district or charter school within one year after the date it issued the changed corrective action plan.

14. If the Department finds continued non-compliance during the follow-up evaluation, the district or charter school shall be referred to the State Board for a determination, pursuant to A.R.S. § 15-755(D), of non-compliance for purposes of continuing to receive group B weight funds for LEP students, as described in A.R.S. § 15-943. A district or charter school determined to be non-compliant pursuant to this subsection shall not reduce the amount of funds spent on its LEP programs as the result of its loss of group B weight funds for its LEP students because of its continued non-compliance.

15. The Department shall monitor all districts or charter schools that the State Board has determined, pursuant to A.R.S. § 15-755(D), are non-compliant and are no longer receiving group B weight funds for LEP students to ensure that such districts or charter schools do not reduce the amount of funds spent on

their bilingual education programs as the result of its loss of group B weight funds.

16. The Department shall begin the monitoring described in this section before July 1, 2000.

APPROVED AS TO FORM AND CONTENT this 30th day of June, 2000.

ARIZONA CENTER FOR LAW IN THE PUBLIC INTEREST

By /s/ Timothy M. Hogan
Timothy M. Hogan
Attorneys for Plaintiffs

JANET NAPOLITANO
Attorney General

By /s/Lynne C. Adams
Lynne C. Adams
Assistant Attorney General
Attorneys for Defendants

Appendix C

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MIRIAM FLORES, individually and as a parent of MIRIAM FLORES, a minor child, et. al., Plaintiffs, v. STATE OF ARIZONA; et al., Defendants.	CIV 92-596 TUC ACM **ORDER**

Background: Motion for Post-judgment Relief

On January 24, 2000, this Court issued a declaratory judgment against the Defendants for failing to provide limited English proficient (LEP) children with a program of instruction calculated to make them proficient in speaking, understanding, reading, and writing English, while enabling them to master the standard academic curriculum as required of all students. See Lau v. Nichols, 414 U.S. 563 (1974) (failure to provide English instruction to students of Chinese descent who do not speak English denies them a meaningful opportunity to participate in public education and violates Title VI, 42 U.S.C. § 2000d). The Court's ruling came against a backdrop of state inaction, existing in 1992 when Plaintiffs filed the class action law suit and continuing through the duration of the case.

Appendix C

This Court held that as a matter of law the State's minimum base level for funding Lau programs[1] bears no relation to the actual funding needed to ensure that LEP students are achieving mastery of the State's specified "essential skills," (Judgment at 23.) The Court ruled that the State's appropriation of $150.00 per LEP student is arbitrary and capricious because it is not reasonably calculated to effectively implement the Lau programs adopted by the Nogales Unified School District (NUSD), which have been approved by the State. (Judgment at 23.) The Court made this finding based on a 1987-88 cost study that showed it cost approximately $450.00 per LEP student to provide Lau program instruction.

At the time the Court ruled, Defendants questioned the reliability of their own 1987-88 cost study. Defendants attacked their studies' credibility because it was so old, and the methodology for the study was not ascertainable and, therefore, its integrity was questionable. The State had never updated the 1987-88 study. At trial, the Defendant informed the Court that the State legislature had established the English as a Second Language and Bilingual Education Study Committee to conduct a cost study to determine the amount of funding provided by the State and Federal governments for English instruction of LEP students and the amount of money being spent by schools to educate those students. In the Judgment issued by this Court

---

[1] Now being called the English Acquisition program (EAP).

January 24, 2000, the Court noted that this was the first step the State needed to take towards setting a minimum base funding level for Lau programs that would not be arbitrary and capricious. (Judgment at 23.) The Committee was supposed to submit the report to the Governor's office by December 19, 1999, to recommend the level of funding necessary to support the programs that it determined to be the most effective. The Report was timely submitted, but it failed to contain the recommendations for funding levels. After the regular legislative session convened in January, 2000, Plaintiffs sent a letter to the legislature asking that the cost study be performed. A Senate bill was introduced that would have provided for the study, but it was defeated. Several amendments were also defeated which would have provided funding for the State Department of Education to perform the cost study. The legislative session ended April 18, 2000, with the State continuing its pattern of inaction.

June 6, 2000, Governor Hull convened a special session on education to address a 0.6 funding increase in the state sales tax for specified educational programs. Lau programs were removed from the list of permissible items to be funded by the state sales tax. Again, the legislature rejected an amendment that required the state to conduct the cost study of *Lau* programs. On June 30, 2000, Governor Hull signed the bill providing for the increase in state sales tax to finance education. Again, the state failed to take any action to fund Lau programs in Arizona at a level reasonably calculated to make LEP students proficient in speaking,

understanding, reading, and writing English. Contrary to the information provided to this Court in January of 2000, the State has not even taken the first step of conducting the cost study.

Against this backdrop, Plaintiff's Motion for Post-judgment Relief asks this Court to order the Sate to conduct the cost study by November 1, 2000, so that the State legislature will be in a position to fund Arizona's Lau programs during its next legislative session, which begins January 1, 2001. This is especially important because Arizona has a biannual budget so unless funding is secured this session, LEP students will have to wait until 2003 to see any improvement in funding for Lau programs.

Defendants, however, suggest that further delay is necessary because conducting the cost study now is unrealistic and counterproductive in light of the Consent Decree entered in this action in June, 2000. Now that Defendants have agreed to make procedural and substantive revisions to the State Lau programs, as sought by Plaintiff's in this very class action law suit, the cost study can only be conducted after the changes are implemented and in place for some period of time. Only then, after the Department of Education has had an opportunity to determine which programs are working well, should the cost of the Lau Programs be calculated. Besides, there is a referendum item, Proposition 203, on the November ballot which will repeal the existing bilingual education statutes and adopt a one-year immersion program for LEP students.

Defendants propose that during this next legislative session the Department of Education will

ask the legislature to provide $300,000 in funding to conduct the cost study and perform the monitoring required under the Consent Decree. If funded by the legislature, the study would begin in the summer of 2001 and be complete in the spring of 2002. This would be just in time for the next biannual budget in 2003.

This Court is not surprised by Defendants' suggestion to continue to delay appropriating adequate funding for Lau programs in Arizona, nor is the Court surprised by the continued inaction of the State legislature. See Roosevelt Elementary School District No. 66, et al., v. C. Diane Bishop, (Roosevelt I) 877 P.2d 806 (1994) (en banc), appeal after remand, Hull v. Albrecht, (Roosevelt II) 950 P.2d 1141 (1997), appeal after remand, (Roosevelt III) 960 P.2d 634 (1998) (continued legislative refusal to take action as directed by the state courts to remedy disparities in school financing). The Court is, however, surprised by the Defendants' brazen argument that a cost assessment cannot be done now because it should not be "based on models that have not been getting the job done." (Response at 3.)[2] For example, Defendants argue: "A study of the state's English Acquisition Programs prior to implementation of the changes envisioned by the Consent Order would, however, be just that-an assessment of the costs of a system that both plaintiffs and defendants agree was not appropriate." Id.

---

[2] This same language is reflected in Proposition 203.

Appendix C

This Court Order of January 24, 2000, made 64 specific Findings of Fact and not one criticized the Lau models being used to teach LEP students in Arizona. The parties agreed "that the State of Arizona has prescribed, and NUSD has adopted, models that are generally regarded by experts as sound designs for effective Lau instruction." (Judgment at 22.) The Judgment entered by this Court was that the primary reason the Lau programs failed LEP students in Nogales, Arizona, was because the programs were not adequately funded by the State.

Plaintiffs' Reply accurately reflects the findings and conclusions of this Court, as follows:

...The Court determined in its Conclusions of Law that the State of Arizona had prescribed, and NUSD had adopted, models that are generally regarded by experts as sound designs for effective Lau instruction. Judgment at 22, Conclusion of Law (A)(3). The Court further concluded that the state's minimum $150 appropriation per LEP student, in combination with its property based finance scheme, is inadequate and has resulted in the following Lau program deficiencies:

1. Too many students in a classroom.
2. Not enough classrooms.
3. Not enough qualified teachers, including teachers to teach ESL and bilingual teachers to teach content area studies.
4. Not enough teacher aides.
5. An inadequate tutoring program, and

6. Insufficient teaching materials for both ESL classes and content area courses.

These deficiencies are not the result of an inadequate model. The model was prescribed by the state and adopted by NUSD. *Id.* at 22. The problem is the state's inadequate funding to support the model.

Reply at 4-5 (citing Judgment at 22.)

This Court agrees with Plaintiffs, as follows:

There is no reason to wait to address [the] cost of the deficiencies identified by die Court. The cost implications of those deficiencies have not changed as a result of the Consent Order. The Consent Order did not change the models for providing bilingual and ESL instruction at all. Instead, the Consent Order prescribes implementation procedures for those models. . . . While there may be additional cost implications associated with the Consent Order, they are most assuredly modest compared to the structural funding problems identified by the Court.

Reply at 4-5. Additionally, the Court adds that even if Proposition 203 passes there will still be costs associated with the "new" English immersion model. There are costs which are common to all programs of instruction for LEP students.

The Court is not persuaded that a specific model must be implemented and successfully operating before a cost assessment can be prepared.

Appendix C

Cost studies are routinely performed prior to implementing a model and serve the useful purpose of comparing costs of various models. Models do not become successfully operational without funding; therefore, it is Defendants' proposal to wait that is unrealistic and counterproductive. Unless, a realistic cost assessment is prepared and available this legislative session, which begins January 8, 2001, Plaintiffs will miss the biannual budget process and will have to wait until 2003 for Lau programs to be funded at a level that is not arbitrary and capricious.

Judgment having been entered against Defendants, Plaintiff is entitled to equitable relief. Alaska Center for the Environment v. Browner, 20 F.3d 981, 986-87 (9th Cir. 1994) (district court has broad latitude to fashion equitable relief when necessary to remedy an established wrong); Swan v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15-17 (1971) (if school authorities fail in their affirmative obligations . . ., judicial authority may be invoked). The "remedial powers of an equity court must be adequate to the task, . . . they are not unlimited,'" Missouri v. Jenkins, 495 U.S. 33, 51 (1990) (quoting Whitcomb v. Chavis, 403 U.S. 124, 161 (1971), "and one of the most important considerations governing the exercise of equitable power is proper respect for the integrity and function of local government institutions." Jenkins, 495 U.S. at 51. Obviously, here, the equitable relief requested by Plaintiffs encroaches on a domain that primarily belongs to local government institutions, including the State's legislature. Therefore, the Court

exercises it equitable power conscientiously and takes every step to allow state authorities, whose powers are plenary, to decide how to provide LEP students with a meaningful Lau program. Assessing the cost of such a program, however, does not involve public policy considerations. Against the egregious backdrop of state agency and judicial inactivity, the Court must grant Plaintiffs' requested relief because without judicial action, the federal law violations as set out in this Court's Order of January 24, 2000, will continue for at least another three years.

Accordingly,

IT IS ORDERED that Plaintiffs' Motion for Post-Judgment Relief is GRANTED.

IT IS FURTHER ORDERED that Defendants, the State of Arizona, shall prepare a cost study to establish the proper appropriation to effectively implement the State's Lau educational theory.

IT IS FURTHER ORDERED that the cost study shall be prepared in a timely fashion so that the Arizona legislature can appropriate funding for Lau programs during the upcoming biannual budget session, beginning January, 2001.

IT IS FURTHER ORDERED that as to the one remaining issue in this litigation, teacher certification or language endorsements, a Pretrial Conference shall be held before this Court on November 3, 2000 at 11:30 a.m.

Dated this 12th day of October, 2000.

Appendix C

/s/ Alfredo C. Marquez
Senior U.S. District Judge

Appendix D

United States District Court, D. Arizona.

Miriam FLORES, individually and as a parent of Miriam Flores, a minor child, et. al., Plaintiffs,
v.
STATE of Arizona, et. al., Defendants.
No. CIV. 92-596TUCACM.

June 25, 2001.

ORDER
MARQUEZ, Senior District J.

Post-judgment Relief

On January 24, 2000, this Court issued a declaratory judgment against the Defendants for failing to provide limited English proficient (LEP) children with a program of instruction calculated to make them proficient in speaking, understanding, reading, and writing English, while enabling them to master the standard academic curriculum as required of all students. (See Findings of Fact and Conclusions of Law (citing Lau v. Nichols, 414 U.S. 563 (1974) (failure to provide English instruction to students of Chinese descent who do not speak English denies them a meaningful opportunity to participate in public education and violates Title VI, 42 U.S.C. § 2000d)). The Court's ruling came against a backdrop of state inaction, existing in 1992 when Plaintiffs filed the class action law suit and continuing through the duration of the case.

Appendix D

This Court held that as a matter of law the State's minimum base level for funding Lau programs[1] bears no relation to the actual funding needed to ensure that LEP students are achieving mastery of the State's specified "essential skills." (Judgment at 23.) The Court ruled that the State's appropriation of $150.00 per LEP student is arbitrary and capricious.

This was the basis upon which this Court entered its Order of October 12, 2000 granting post-judgment relief and ordered the State to prepare a cost study to establish the proper appropriation to effectively implement the State's Lau educational theory. In that Order, the Court ordered that the cost study should be prepared in a timely fashion so that the Arizona legislature could appropriate funding during the budget session beginning January 1, 2001.

While the cost study was completed, the legislature did not consider funding the Lau programs. Therefore, Plaintiffs seek further post-judgment relief. On May 22, 2001, Plaintiffs filed a Motion for injunctive relief, asking the Court to set a deadline for the State to comply with the Court's January 24, 2000 Declaratory Judgment. Specifically, Plaintiffs asked the Court to set a date by which Defendants shall remedy the arbitrary and capricious nature of the State's minimum base level that it appropriates per LEP student. Plaintiffs asked the Court to consider its request for further

---

[1] Now being called the English Acquisition Program (EAP).

post-judgment relief on an expedited basis so that any injunction issued by the Court would be in place in the event a special session of the state legislature convenes. The State objected to the request for an expedited ruling, but did not file a Response to the Motion for Injunctive Relief.

On June 8, 2001, the Court held a hearing on Plaintiffs' Motion for Injunctive Relief. Defendants argued that the Department of Education should study the issues further and prepare a recommendation to the legislature regarding appropriate funding levels. The Court rejected these arguments and granted the Plaintiffs' Motion for Injunction. The Court issued a Minute Entry setting a deadline for the end of January 2002, for the state to comply with the Declaratory Judgment issued January 24, 2000 and ordered that if the Governor calls a special session of the Arizona legislature, the call shall include the necessary agenda item to ensure legislative compliance during the special session. The Court asked counsel for Plaintiffs to prepare a formal Order for its signature. Plaintiffs' counsel has submitted such an Order, which basically paraphrases the Court's civil minute entry. Defendants object.

Defendants assert that this Court has no power to order the Governor to place the issue of Lau funding on the agenda of a legislative special session. Defendants note that the January 24, 2000 Order, was declaratory in nature and asks that a supplemental Order be issued to set out the precise aspects of the Declaratory Judgment, which require compliance. First, these arguments should have

been made in response to the Motion for Injunction or at oral argument. Second, while the Judgment granted for Plaintiff was declaratory, the Court's Findings of Facts and Conclusions of Law set out the specific violations upon which the Court based its Declaratory Judgment.

Just as these findings were an adequate basis for the issuance of this Court's post-judgment directive to the State to perform the cost study, these findings are an adequate basis for this Court to grant Plaintiff's request for further injunctive relief. On January 24, 2000, this Court held that as a matter of law the State's minimum base level for funding Lau programs was arbitrary and capricious because it bears no relation to the actual funding needed to ensure that LEP students are achieving mastery of the State's specified "essential skills." (Judgment at 23.) Until remedied, Defendant fails to comply with the declaratory judgment and Plaintiffs are entitled to equitable relief.

Accordingly,

IT IS ORDERED that Plaintiffs' Motion for Injunctive Relief, filed May 22, 2001, (document # 217) is GRANTED.

IT IS FURTHER ORDERED that on or before January 31, 2002, Defendants shall comply with the Court's Declaratory Judgment, filed January 24, 2000. Specifically, the State's minimum base level of funding per LEP student shall not be arbitrary and capricious, but shall bear a rational relationship to the actual funding needed to implement language acquisition programs in Arizona's schools so that

Appendix D

LEP students may achieve mastery of the State's specified "essential skills."

Appendix E

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MIRIAM FLORES, individually and as a parent of Miriam Flores, a minor child, et al., Plaintiffs, v. STATE OF ARIZONA; et al., Defendants.	CIV 92-596-TUC-ACM ORDER

Post-judgment Relief

The Court's Declaratory Judgment, issued January 24, 2000, determined that the state's minimum level for funding Lau[1] programs is arbitrary and capricious and "bears no relation to the actual funding needed to ensure that LEP[2] students" are achieving mastery of the state's academic standards.

---

[1] Lau v. Nichols, 414 U.S. 563 (1974) (failure to provide English instruction to students of Chinese decent who do not speak English denies them a meaningful opportunity to participate in public education and violates Title VI, 42 U.S.C. § 2000(d)).

[2] These children are now being referred to as "English Language Learners (ELL)," rather than as "Limited English Proficient (LEP)" students.

(Findings of Fact and Conclusions of Law (Declaratory Judgment) at 23 (Document 196).) Since entry of the favorable Judgment, Plaintiffs have twice sought post-judgment relief. The motion now pending before the Court, "Second Motion for Injunction," is the third.

On October 12, 2000, the Court ordered the State to conduct a cost study to determine a funding level, which would effectively implement English language acquisition programs in Arizona. (Order at 6 (Document 209).) The intent of the Order was to provide the legislature with a realistic cost estimate during the legislative session, beginning January 8, 2001, so that funding could be appropriated during that regularly scheduled biannual budget process. The cost study was completed in May of 2001, but the legislature did not appropriate funding for language acquisition programs during the regular session. Subsequently, Plaintiffs sought and were granted further post-judgment relief. On June 25, 2001, the Court ordered the State to comply with the directives of the January 24, 2000 Declaratory Judgment by the end of any special session convened by the State legislature. (Order at 3-4 (Document 226)). In other words, the State had until the end of any convened special session to set a minimum base level of funding per ELL[3] student, which bears a rational relationship to the actual funding needed to

---

[3] See n. 2.

implement language acquisition programs in Arizona's schools.

A special session was convened on November 13, 2001, and on December 19, 2001, the legislature enacted HB 2010 to address the mandates of Flores. The legislature has changed the funding formula to increase funding per ELL student from .06 (approximately $178.78 per student) to 1.15 (approximately $339.91). This amount reflects the costs that the Nogales Unified School District (NUSD) was incurring as reported in the 2001 cost study.

The legislation also appropriated special funding for the following: 1) teacher training ($4.5 million); 2) compensatory instruction capped at $100 per student ($5.5 million), and 3) instructional materials and supplies at $10 per student ($1.5 million). Additional money, not necessarily related to language acquisition programs, was appropriated as follows: 1) $316,094 for the Department of Education to monitor school districts; 2) $3,060,00 for a bonus program that provides $250 to school districts for each student that it reclassifies out of the English acquisition program; 3) $750,000 for a K-3 literacy program; and 4) $500,000 for another cost study.

The motion now pending before the Court challenges HB 2010. Plaintiffs argue that the $339 per ELL student appropriated by HB 2010 is every bit as arbitrary and capricious as the $150 per LEP

student appropriation, which this Court invalidated in its January 24, 2000 Order. It too violates Title VII, 42 U.S.C. § 2000(d) because it fails to have any rational relationship to the actual cost of implementing a language acquisition program. The special related appropriations found in HB 2010 are equally arbitrary and capricious because Arizona has never set specific standards for its programs, nor identified the requisite elements, features, or components for such programs and, therefore, has never assessed actual costs for language acquisition programs.

HB 2010 can not rely on what NUSD spent on its program because it was the very program that this Court's Declaratory Judgment held to be deficient for a number of specific reasons on January 24, 2000. For example, the Court specified that NUSD's Lau program violated the EEOA as follows: 1) too many students in a classroom; 2) not enough class rooms; 3) not enough qualified teachers,[4] including teachers to teach ESL and bilingual teachers to teach content area studies; 4) not enough teacher aids; 5) an. inadequate tutoring program; and 6) insufficient teaching materials for both ESL classes and content area courses. (See Declaratory Judgment: Conclusions of Law at ¶ 7.)

In January of 2000, the State legislature had created the English as a Second Language (ESL) and

---

[4] See also (Declaratory Judgment; Findings of Fact at ¶ 53.)

Appendix E

Bilingual Education Study Committee (Education Study Committee) to: 1) determine the cost of educating LEP students versus what is currently being spent; 2) determine the best practices in bilingual education and ESL; 3) look at ways to improve bilingual education in the school districts across the state; and 4) determine if programs are in compliance with state and federal mandates. (See Declaratory Judgment: Findings of Fact) at ¶ 11.) The Court noted that this study was aimed at more accurately assessing LAU program costs and would provide a basis for the State to set a minimum base funding level per LEP student which would not be arbitrary and capricious. (Declaratory Judgment: Conclusions of Law at ¶ at 9 (citing Roosevelt II, 950 P.2d 1141, 1145 (1997) (performing an equal protection analysis, the Roosevelt Court held that it could only determine the adequacy of the State's program once a minimum standard had been set).[5] The Court specifically found that "[f]or the State to adopt appropriate practices and allocate adequate resources, it must first establish minimum standards for providing LAU funding and program oversight." (Declaratory Judgment: Conclusions of Law at ¶ 4.)

---

[5] Roosevelt Elementary School District No. 66, et al. v. C. Diane Bishop, (Roosevelt I) 877 P.2d 806 (1994) (en banc), appeal after remand, Hull v. Albrecht, (Roosevelt II) 950 P.2d 1141 (1997), appeal after remand (Roosevelt III) 960 P.2d 634 (1998) (equal protection analysis applied to claim that Arizona's school financing scheme violated the General and Uniform Clause of the Arizona Constitution).

Appendix E

To date, the only task completed of those assigned to Education Study Committee in 2000, is the determination of what is currently being spent. With modifications to reflect the passage of Arizona's English Immersion program, the following tasks remain: determine the best practices in language acquisition programs and look at ways to improve Arizona's language acquisition programs so that they are in compliance with federal and state law mandates, and determine the costs of operating such programs in Arizona. Completing these tasks will enable the legislature to establish minimum standards, upon which it can base its cost assessments for funding Arizona's language acquisition programs.

Accordingly,

IT IS ORDERED that Plaintiffs' "Second Motion for Injunction" (Document 234) is GRANTED.

IT IS FURTHER ORDERED that the State shall perform a cost study, including all of the elements necessary for the legislature to determine a cost actually related to the operation of an English Immersion program.

IT IS FURTHER ORDERED that the deadline for completing the cost study is January 1, 2003.

IT IS FURTHER ORDERED that the deadline for the State's compliance with the Declaratory

Appendix E

Judgment entered in this case on January 24, 2000, shall be extended to June 30, 2003.

DATED this 5 day of April, 2002.

/s/ ALFREDO C. MARQUEZ
ALFREDO C. MARQUEZ
Senior U.S. District Judge

Appendix F

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MIRIAM FLORES, individually and as a parent of Miriam Flores, a minor child, et al., Plaintiffs, v. STATE OF ARIZONA; et al., Defendants.	CIV 92-596-TUC-ACM ORDER

On April 19, 2002, the Court received Defendant's Motion for Reconsideration of its Order issued April 11, 2002, which denied Defendants leave to supplement their Response with a declaration from Ron Hennings. The Defendants also asked the Court to reconsider the Order, filed April 8, 2002, which granted Plaintiffs second request for injunctive relief. On April 30, 2002, the Court reconsidered the April 11th Order and allowed the Defendant's to file the Hennings declaration. The Hennings declaration and the Defendant's Motion for Reconsideration provide the details that this Court has needed to make an informed assessment as to whether or not the State's funding for Arizona's language acquisition programs is rationally related to actual program costs. In light of the details and explanations given in the State's Motion to

Reconsider, including the Hennings declaration, and the Reply, the Court finds that the State has taken appropriate action to address the directives issued in this case, especially since the Legislature adopts the new funding under HB 2010 as an interim measure pending further study and review. "Because the legislature recognized that its funding levels may require further adjustment, and the HB 2010 cost study has not been completed, the Defendants have not asked the Court to terminate this litigation." (Reply at 10.) At this interim point in time, the Court finds that the funding levels appropriated in HB 2010 bear a rational relationship to the estimated cost of implementing the language acquisition program in Nogales Unified School District (NUSD).

Accordingly,

IT IS ORDERED that Defendant's Motion to Reconsider (document 253) is GRANTED and this Court's Order, filed April 8, 2002, is VACATED.

IT IS FURTHER ORDERED that Plaintiff's Second Motion for Injunctive Relief is DENIED.

DATED this 7th day of June, 2002.

/s/ Alfredo C. Marquez
Alfredo C. Marquez
Senior U.S. District Judge

Appendix G

LAW OFFICE OF
DAVID CANTELME, P.L.C.
A Professional Liability Corporation
3101 NORTH CENTRAL AVE, SUITE 720
PHOENIX, ARIZONA 85012

(602) 200-0104 Fax (602) 200-0106
E-mail:djc@cantelaw.com
David J. Cantelme, Arizona State Bar No. 006313
Attorneys for the Speaker of the Arizona
House of Representatives and for the
President of the Arizona Senate

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Miriam Flores, individually and as a parent of Miriam Flores, a minor child, et al., Plaintiffs, v. State of Arizona; et al., Defendants.	**No.** CIV 92-596-TUC-RCC **MOTION TO INTERVENE OF SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES AND PRESIDENT OF THE ARIZONA SENATE** Assigned to Honorable Raner C. Collins

Pursuant to Rules 24(a) and (b), F.R.Civ.P., the Speaker of the Arizona House of Representatives

("Speaker") and President of the Arizona Senate ("President") move to intervene in this action, on behalf of their respective bodies, to defend the plan for English Language Learners ("ELL") adopted by the Arizona Legislature in H.B. 2064, otherwise to defend the interests of the Legislature in this action, and to oppose the plan for distribution of accrued fines proposed by the Attorney General. Intervention of right is proper under Rule 24(a) because the Court already has subjected the Legislature to its order of December 15, 2005, the Legislature has Art. III standing under the circumstances and its interests are not represented adequately by defendants. Permissive intervention is proper under Rule 24(b), for the reasons applicable to Rule 24(a) and for the additional reasons of common questions of law and fact with the defenses that should be made by existing defendants in this case.

MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION.

On March 8, 2006, the Arizona House and Senate authorized their respective presiding officers to appear herein for them. On March 2, 2006, the Legislature passed H.B. 2064 ("Act"), and the Governor elected to allow it to become law without her signature. On March 3, 2006, the Attorney General filed the Act with the Court, together with the Governor's March 3, 2006, letter noting her objections to the Act. The two branches of state government have a deep split over how best to teach youngsters to speak English, what federal law

requires for ELL, and how to comply with the Court's orders. This split puts the Attorney General in an awkward if not impossible position. The Attorney General has a legal duty to defend the Act and the plan it adopts. Yet one must acknowledge that he has shown little enthusiasm for advancing the interests of the Legislature, as most recently illustrated by his filing of the Governor's objections to the Act and of his proposal for distribution of accrued fines. Because the Governor has elected to allow the Act to become law, her objections are irrelevant and should not have been brought before the Court, unless the Attorney General intends to advance them in opposition to the Act, despite his duty to defend it. As shown below, intervention is appropriate under Rules 24(a) and (b). It is essential to a fair resolution to allow a full defense of the Act and the Legislature's interests, rather than the guarded defense that must result if presented by counsel who must answer to a State government divided by huge differences over the case. A proposed motion to purge the contempt is attached as exhibit, minus the exhibits to that motion.

2. INTERVENTION OF RIGHT.

The Ninth Circuit has stated the test for intervention of right as follows:

(1) the intervention application is timely; (2) the applicant has a significant protectable interest relating to the property or transaction that is the subject of the action; (3) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the

existing parties may not adequately represent the applicant's interest.

Prete v. Bradbury, No. 04-35285, slip op. at 6 (9th Cir., 2/22/06). The test is met here.

a. Intervention is Timely.

Intervention is timely for the purposes set forth in this motion. While the case is old, the Court subjected the Legislature directly to one of its orders for the first time on December 15, 2005, and the Act in direct response to that order was adopted on March 2, 2006. Thus intervention now to defend the Act is timely.

b. The Legislature Has a Direct and Protectable Interest.

The Legislature has a direct and protectable interest in this matter. In the order of Dec. 15, 2005, the Court ordered that "the legislature has 15 calendar days from the beginning of the 2006 legislative session to comply with the January 28, 2005 Court order." Therein the Court subjected the Legislature directly to one of its orders, in an exercise of the Court's equitable powers. *See* Dec. 15, 2005, order at 11 ("This power has been relied on to hold city and state legislatures in contempt. *See Spallone v. United States*, 493 U.S. 265, 276 (1990)"). After this order's issuance, with the citation to *Spallone*, the Legislature effectively has become a party to this case, willingly or not. Having been subjected to the Court's contempt power, the Legislature should be afforded a chance to defend itself.

The Legislature has sufficient interest to intervene in any event apart from the December 15,

2005, order.[1] It adopted the Act and thus has a right to defend it. *See Karcher v. May*, 479 U.S. 72 , 82 (1987) (Speaker of the N. J. General Assembly and President of the N. J. Senate could intervene to defend an act passed by the N.J. Legislature); *Silver v. Pataki*, 755 N.E. 2d 842, 848 (N.Y. 2001) (Assembly member "undoubtedly has suffered an injury in fact with respect to the alleged unconstitutional nullification of his vote sufficient to confer standing.") Both Houses have authorized their officers to bring this motion, thus clearing the capacity hurdle of *Bennett v. Napolitano*, 206 Ariz. 520, 527, ¶29, 81 P.3d 311 (2003).

c. The Disposition in This case Will Directly Affect the Legislature.

An unfavorable disposition in this action will directly impair the Legislature's ability to protect its interest. If the Court finds the Act to be inadequate

---

[1] Neither the Supreme Court nor the Ninth Circuit has said whether Art. III standing is required to intervene of right. *Prete, supra*, at 9 n. 8. A majority of circuits considering the issue have held Art. III standing is not required. *Compare Ruiz v. Estelle*, 161 F.3d 814, 832 (5th Cir. 1998) (no independent intervenor standing needed); *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 690 (6th Cir. 1994) (same); *Chiles v. Thornburgh,*, 865 F.2d 1197, 1212 (11th Cir. 1989) *U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978) (same), *with Planned Parenthood of Mid-Missouri & Eastern Kansas, Inc. v. Ehlmann*, 137 F.3d 573, 576-77 (8th Cir. 1998) (requiring independent intervenor standing) *and Building & Const. Trades Dep't v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994) (same).

to satisfy the Court's orders, the Court may compel the Legislature to return to the task and to find money to pay for increased spending, the Court may ratchet up the penalty for disobedience of its order, and the Legislature will be prevented from turning its attention to other pressing State business.

d. Only the Legislature Can Defend Its Interests Adequately.

The existing parties will not defend the Legislature's interests adequately. The Attorney General faces an institutional dilemma in trying to serve two masters. As a result, neither he nor his predecessor has represented the interests of the Legislature adequately; to wit: The Attorney General failed to take an appeal of the judgment entered in this case in 2000 and has failed to appeal any of the injunctions and other orders issued in aid of the judgment, most recently having failed to take an appeal of the order of December 15, 2005. Yet the Attorney General acknowledged to the Legislature that the Motion for Clarification of Court's order that the Attorney General filed on January 18, 2006, "perhaps . . . should not have been before the court." *See* excerpt of unofficial transcript, at 3, attached as Exhibit 1 to Memorandum of the Speaker of the Arizona House Responding to the Order of January 27, 2006, of Representatives and of the President of the Arizona Senate. This inadequacy was shown further at the hearing of Feb. 13, 2006, when the Attorney General went so far as to oppose the stay of the Dec. 15, 2005 order requested by the Superintendent of Public Instruction. *See* Transcript of Hearing of Feb. 13, 2006, at 13, line 23, to 14, line

7. The Attorney General has admitted in testimony that the Legislature should have its own counsel:

Chairman Burns, I'd be delighted to do that. And I understand I was just given today a letter from the Speaker requesting from the court for the opportunity to appear in this case. That is something that I applaud and I believe it is highly appropriate. Up until now, basically the Legislature has used surrogate appearances with Mr. Home's counsel before this court. And that's been kind of awkward. Perhaps the best solution is the one that's just been applied for.

See excerpt of unofficial transcript, *supra*, at 1.

Nor can the Superintendent represent the interests of the Legislature, though he has gone on record supporting the Act. The Superintendent's difficulty is that his institutional interests are not the same as the Legislature's. He does not share the power to appropriate, which is the core interest affected herein. What's more, plaintiffs have challenged the Superintendent's standing to appeal the sanctions order. The Superintendent will have no power, if plaintiffs succeed, to defend the Legislature's interests in this case.

3. PERMISSIVE INTERVENTION SHOULD BE GRANTED.

The Ninth Circuit has stated the test for permissive intervention as follows:

(1) independent grounds [exist] for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common.

League of Un.. Latin Am. Cit. v. Wilson, 131 F.3d 1297, 1308 ¶ 40 (9th Cir. 1997). This test is met here. As shown above, the Legislature has Art. III standing to intervene and defend the Act and the Court already has subjected the Legislature to the order. The Legislature's intervention to defend the Act is timely, and the Act will be the center of the battle over whether the State has complied with the Court's orders and purged itself of contempt.

4. CONCLUSION.

For these purposes, the Court should allow the Speaker and President to intervene.

RESPECTFULLY SUBMITTED on March 7, 2006.

LAW OFFICE OF DAVID CANTELME, P.L.C.

/s/_____

David J. Cantelme
3101 N. Central Avenue, Suite 720
Phoenix, AZ 85012
(602) 200-0104
Attorneys for the Speaker of the Arizona House of Representatives and for the President of the Arizona Senate

CERTIFICATE OF SERVICE

I CERTIFY THAT ON, 2006, I mailed a copy of the foregoing to:

The Honorable Raner C. Collins
United States District Court
Evo A. DeConcini U.S. Courthouse
405 West Congress Street, Suite 5170
Tucson, AZ 85701-5051

Appendix G

I FURTHER CERTIFY that I electronically transmitted the attached document to the Clerk's Office using the CM/CEF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Timothy M. Hogan thogan@aclpi.org
Joy Herr-Cardillo jherrcardillo@aclpi.org
Lynne Christensen Adams ladams@lrlaw.com; cmarino@lrlaw.com
Jose A. Cardenas jcardenas@lrlaw.com; kwochos@lrlaw.com
David A. Garner jgarner@lrlaw.com; pnavarro@lrlaw.com
James J. Sienicki jsienicki@swlaw.com
Ronald W. Messerly rmesserly@swlaw.com
Keith F. Overholt koverholt@jsslaw.com
Michael J. Farrell mfarrell@jsslaw.com
Susan P. Segal susan.segal@azag.com
Eric J. Bistrow EBistrow@bcattorneys.com

/s/ David J. Cantelme

Appendix G

EXHIBIT 1 TO MOTION TO INTERVENE

LAW OFFICE OF
DAVID CANTELME, P.L.C.
A Professional Liability Corporation
3101 NORTH CENTRAL AVE, SUITE 720
PHOENIX, ARIZONA 85012

(602) 200-0104 Fax (602) 200-0106
E-mail:djc@cantelaw.com
David J. Cantelme, Arizona State Bar No. 006313
Attorneys for the Speaker of the Arizona
House of Representatives and for the
President of the Arizona Senate

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Miriam Flores, individually and as a parent of Miriam Flores, a minor child, et al., Plaintiffs, v. State of Arizona; et al., Defendants.	No. CIV 92-596-TUC-RCC **MOTION OF INTERVENOR DEFENDANTS SPEAKER AND PRESIDENT TO PURGE THE STATE OF ARIZONA OF CONTEMPT AND MOTION TO DISSOLVE INJUNCTION**

Appendix G

Assigned to Honorable Raner C. Collins

Intervenor defendants Speaker of the Arizona House of Representatives ("Speaker") and President of the Arizona Senate ("President") move the Court to purge the State of Arizona from the contempt found by the order of December 15, 2005, for the following reasons: The Arizona Legislature has adopted H.B. 2064 ("Act"), the Act will become law on March 9, 2006, and it creates a plan for adequate funding of programs for English Language Learners ("ELL"). The Act also satisfies applicable federal law and the judgment and orders of this Court when considered in itself and in conjunction with the massive reforms of Arizona K-12 education. Those reforms include (i) the adoption of the Students FIRST program for school construction and renovation, (ii) the huge infusion of funding to K-12 schools occasioned by the six-tenths of a cent hike in the State sales tax under Proposition 301, and (iii) Congress's adoption of the No Child Left Behind Act ("NCLBA") in 2001. The Speaker and President further move to dissolve the injunction entered on June 25, 2001, because NCLBA preempts the Court's authority to compel State adoption of an ELL plan.

MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION

A party found in civil contempt must be given an opportunity to purge itself of the contempt. See

United States v. Ayres, 166 F.3d 991, 997 (9th Cir. 1999) ("Civil contempt sanctions, however, are only appropriate where the contemnor is able to purge the contempt by his own affirmative act . . . . "). Compensatory civil contempt sanctions must end once a party has proven that it is purged of the contempt. *See Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 516 (9th Cir. 1992). The Speaker and President show below: (a) The Act complies in all material respects with the judgment of this Court; and (b) apart from the Act itself, enormous reforms of Arizona K-12 education have taken place since 2000. These reforms include implementation of Students FIRST, the Proposition 301 sales tax increase, and enactment of NCLBA, and these reforms have been reflected in performance. According to the results found on the Department of Education website, a majority of Arizona schools made adequate yearly progress in 2004-05, including NUSD's ELL students.

Finally, in NCLBA Congress adopted a comprehensive school reform plan that requires accountability, improvement, and remedies for failing schools, and thereby preempts the Court's authority to issue a *Lau*-type of injunction, which has become obsolete.

2. THE ACT OVERHAULS ELL INSTRUCTION IN ARIZONA.

This summarizes the Act's key provisions. The Act:

a. More than doubles the Group B weight for ELL to 0.140, Sec. 6 (A.R.S. § 15-943(1)(b)), increasing from the 0.65 ELL weight that existed when judgment was entered;

b. Continues to provide for identification of ELL students, Sec. 4 (A.R.S. § 15-756);

c. Creates a task force to develop research-based models for English immersion instruction, that takes into consideration significant but varying factors, such as location and size of the school, affected grade levels, the number of ELL students and the percentage of school population comprised by ELL students, and that requires a minimum of four hours per day of English instruction in the first year of instruction, Sec. 4 (A.R.S. §15-756.01);

d. Allows school boards to adopt one or more of the English immersion instruction models, *id.* (A.R.S. § 15-756.02);

e. Creates a structured English immersion fund, *id.* (A.R.S. § 15-756.04), and allows districts to submit an annual budget request to the fund to supplement the district's Group B ELL weights to pay for the district's structured English immersion teaching plan, *id.* (A.R.S. § 15-756.03);

f. Creates a compensatory instruction fund, allows districts to submit annual budget requests to the fund, and directs that such funding be used to provide compensatory instruction to ELL students that can include individual tutoring or small group instruction, extended day classes, and summer school and intersession school, all directed to ELL students or to former ELL students who have become English proficient, *id.* (A.R.S. § 15-756.11);

g. Continues to provide for ELL student testing to identify ELL students who have become English proficient and provides for reclassification of ELL students who have become English proficient, *id.* (A.R.S. § 15-756.05)

h. Provides for revaluation of former ELL students who have become English proficient at least once a year to guard against retrogression, *id.* (A.R.S. § 15-756.06)

i. Directs the State Superintendent to monitor district progress, *id.* (A.R.S. § 15-756.08); and

j. Requires the state auditor general every two years to audit each school district's ELL effectiveness, *id.* (A.R.S. § 15-756.12), and Sec. 7 (A.R.S. § 41-1279.03).

3. MASSIVE REFORMS OF ARIZONA EDUCATION SINCE 2000.

Arizona has poured money into the NUSD, as well as all other Arizona districts, as a result of the enormous changes in Arizona school finance that have occurred since Judge Marquez issued his two injunctions, though admittedly the changes did not occur in a single package. Nonetheless these changes have revolutionized Arizona's method of funding school construction and renovation, have substantially increased teacher salaries and funding for aides and tutoring, and have more than doubled the Group B weights for ELL instruction.

In response to *Roosevelt Elem. S. D. v. Bishop*, 179 Ariz. 233, 877 P.2d 806 (1994), *appeal after remand Hull v. Albrecht*, 190 Ariz. 520, 950 P.2d

1141 (1997), *appeal after remand*, 192 Ariz. 34, 960 P.2d 634 (1998), the Legislature enacted the Students FIRST Act of 1998, Ch. 1, 1998 Ariz. Sess. Laws (5th S.S.) Therein the Legislature adopted minimum physical standards for Arizona classrooms and school buildings, and centralized funding for school construction in the State Facilities Board. The Legislature also created three school funds: The Deficiencies Correction Fund ("DCF"), the Building Renewal Fund ("BRF"), and the New School Construction Fund ("NSCF"). *See Roosevelt Elem. S.D. No. 66 v. State of Arizona*, 205 Ariz. 584, 586 ¶¶ 4-5, 74 P.3d 258 (App. 2003). The Legislature intended the DCF to correct existing deficiencies, the BRF to maintain existing school plants, and the NSCF to fund new construction. According to the SFB, the State paid about $19.0 million to NUSD in 1999-2001 to correct deficiencies in the district's physical plants. According to the SFB website, thereafter the State paid an additional $2.98 million to NUSD for the years 2002-05 for deficiencies correction and building renewal. The State has brought the NUSD facilities up to the State's minimum school building standards. The SFB keeps statistics per school per district showing all funds spent to date for deficiencies correction and building renewal. Thus a break down is available for all renovations made to all schools in the NUSD under Students FIRST.

At the 2000 election, the voters adopted Proposition 301, which added six-tenths of a cent to the State sales tax and devoted this money to Arizona universities and school districts. For the

years 2001-04, Prop 301 has sent at least $1.5 million per year to NUSD. *See* Report of State Auditor General on Classroom Dollars and Proposition 301 Results for 2004 and for 2001; copies attached as exhibit 1.

Finally, Congress adopted NCLBA in 2001, and this has required NUSD, as well as all other Arizona school districts, to adopt district improvement plans, assessments disaggregating data in a number of categories (including ELL students), and to adopt school-specific remediation plans for failing schools.

4. THE JUDGMENT IS SATISFIED.

The results of the increase in Group B weights and the adoption of Students FIRST, Proposition 301, and NCLBA, have been dramatic. Average NUSD teacher salaries increased from $31,121 in 2001 to $39,050 in 2004. *See* exhibit 1. In 2004 the NUSD average teacher salaries exceeded the state average of $38,534, NUSD average teacher years of experience equaled the state average of 8.7 years, and the NUSD student/teacher ratio equaled the state ratio of 18.2. *Id.*

These changes have had a measurable effect in NUSD. According to the Department of Education website, the 2004-05 Title III AMAO Determinations reflect that the NUSD ELL subgroup made adequate yearly progress for that year, though NUSD is in year one of an improvement plan and NUSD overall has not made adequate yearly progress. In contrast with the district as a whole, eight of ten NUSD schools did make adequate yearly progress in 2004-

05 under NCLBA, according to the Department of Education website. *See* Arizona District Report Card 2004-05, Nogales Unified School District; excerpt attached as exhibit 2. In addition, all ten district schools were labeled as performing under AZ Learns. *Id.*

Turning to specifics, a comparison of the deficiencies identified by Judge Marquez in *Flores v. Arizona*, 160 F.Supp.2d 1043, 1046 (D. Ariz. 2000), to applicable provisions of the Act and other post-2000 reforms shows that the judgment has been satisfied in every respect:

a. Too many students in a classroom: By 2004, the student/teacher ratio was reduced to 18.2 per classroom, the same as the 2004 statewide average. *See* exhibit 1.

b. Not enough classrooms: Students FIRST has brought NUSD up to state standards.

c. Not enough qualified teachers: NUSD average teacher experience equals the State average of 8.7 years. *See* exhibit 1. The number of certified teachers in NUSD rose from 296 in 2001 to 322 in 2004. *Id.*

d. Not enough teacher aides: The Act has increased Group B weights and creates the structured English immersion fund, which allows districts to fund these positions in the district's discretion.

e. An inadequate tutoring program: The Act creates the compensatory instruction fund to pay for individual tutoring and small group instruction.

f. Insufficient teaching materials for both ESL classes and content area courses. The increased

Group B weights and immersion fund pays for these materials as well.

Judge Marquez recognized that federal courts did not have authority to substitute their judgment for that of state officials on what makes the best method for teaching English learners. Thus he left it up to the Legislature to craft a program that is not arbitrary and capricious. The Legislature now has done so and has addressed every concern that Judge Marquez identified. One must acknowledge that a great divide exists between those who want to stick with the old bilingual method of English instruction and those who want to substitute English immersion for it, and we believe that division discomfited the attempts to adopt a State ELL plan. No matter. Arizona voters approved Proposition 203, which adopts English immersion as official state policy. The Act now before the Court implements that policy while satisfying the judgment. The Court should purge the contempt.

5. THE ACT DOES NOT SUPPLANT EXISTING FUNDING.

The Act more than doubles Group B weights from 2000 funding levels and creates the structured English immersion fund, and the compensatory instruction fund. The Act prevents the use of the two funds to supplant existing federal or state funding. *See* A.R.S. § 15-756.04(F) ("Monies from the [structured English immersion] fund shall not be used to supplant available monies used to pay normal costs of conducting programs for English

proficient students"); A.R.S. § 15-756.11(G) ("Monies [from the compensatory instruction fund] shall not be used to supplant any federal, state, or local monies .. .. ").

6. NCLBA PREEMPTS AUTHORITY TO COMPEL ELL PLAN ADOPTION.

a. Judge-Made Pre-NCLBA Remedies.

20 U.S.C. § 1703(f) prohibits an educational agency from denying "equal educational opportunity to an individual" by "the failure to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. § 1706 provides a private remedy for a violation. As noted by Judge Marquez, when Congress adopted 20 U.S.C. §§ 1703(f) and 1706, it did not define the meaning of equal education opportunity:

> As noted by the court in *Castaneda*, Congress has provided us with almost no guidance, in the form of text or legislative history, to assist us in determining the standard to apply when considering whether a language remediation program is "appropriate." This is the type of task which federal courts are ill-equipped to perform.

Flores v. Arizona, 48 F.Supp. 2d 937, 948-49 (D. Ariz. 1999). To bridge the gap left by Congress, the Fifth Circuit adopted a three-part test to determine denial of equal education opportunity for ELL students in *Castaneda v. Pickard*, 648 F.2d 989, 1009-10 (5th Cir.

1981.) The test requires a court to determine whether (a) a state is pursuing a remediation program "informed by an educational theory recognized as sound by some experts in the field," 648 F.2d at 1009; (b) the program is reasonably "calculated to implement the educational theory adopted by the school," *id.* at 1010; and (c) the program has been successful after a legitimate trial period. *Id.* Judge Marquez found that NUSD failed this test, *Flores v. State*, 172 F.Supp. 2d 1225, 1240 (D. Ariz. 2000), and that the EEOA authorized injunctive relief to remedy the District's denial of equal opportunity to its ELL students. *Flores v. State*, 160 F. Supp, 2d 1043, 1047 (D. Ariz. 2000). Congress adopted NCLBA after Judge Marquez entered judgment, and thus Judge Marquez never considered or decided the question of whether NCLBA preempted his authority to order compliance with the *Castaneda* test. A review of NCLBA establishes that in it Congress has preempted the Court's authority to issue a *Lau*-type injunction, and accordingly the injunctions in this case should be dissolved.

b. NCLBA Remedies.

After the Fifth Circuit decided *Castaneda* in 1981, and Judge Marquez decided *Flores* in 2000, Congress adopted the NCLBA. NCLBA significant changes in ELL program structure, accountability, assessments, and remediation. With these changes, Congress now has occupied the field, determined

what makes an effective language remediation program, determined what specific remediation measures should be applied for failing ELL programs, and preempted the courts' authority to devise their own relief, as in *Castaneda* and *Flores*.

The NCLBA requires States to:

(i) Establish measurable objectives for ELL students, 20 U.S.C. § 6311(b)(2)(C)(v)(II)(dd);

(ii) Establish a start point for measuring the percentage of students meeting or exceeding the State's level of academic proficiency, 20 U.S.C. § 6311(b)(2)(E);

(iii) Create a timeline showing how, not later than 12 years from 2001-02, all ELL students, among others defined in 20 U.S.C. § 6311 (b)(2)(C)(v), will meet or exceed the proficiency standards, 20 U.S.C. § 6311(b)(2)(F);

(iv) Devise measurable objectives, 20 U.S.C. § 6311(b)(2)(G), and intermediate goals, 20 U.S.C. §6311(b)(2)(H),

(v) Disaggregate assessment results by specified categories, including ELL students, 20 U.S.C. § 6311(b)(3)(C)(xiii);

(vi) Publish an annual state report card, 20 U.S.C. § 6311(h)(1)(A), including data disaggregated for ELL students, 20 U.S.C. § 6311(h)(1(C)(i); and

(vii) Require local education agencies to

-- Develop a local education agency plan, 20 U.S.C. § 6312(a)(1);

-- Describe therein how it will integrate and coordinate services for ELL students, among others, 20 U.S.C. § 6312(b)(1)(E)(ii);

-- Describe its plan to assist low-achieving schools as identified in 20 U.S.C. §6316;

-- Ensure that minority and low-income children are not taught at lower rates by unqualified, out-of-field, or inexperienced teachers; and

-- Make adequate yearly progress, 20 U.S.C. §6311(b)(2)(I), and 20 U.S.C. § 6316(b).

If a school fails to make adequate yearly progress, a two-year detailed plan of remediation must be implemented. 20 U.S.C. § 6316(b)(3). If adequate progress is not made in the first year after the failing identification is made, corrective measures must be adopted, 20 U.S.C. § 6316(b)(7), including at least one of the measures identified in 20 U.S.C. § 6316(b)(7)((C)(iv). The district must provide technical assistance to the failing school, 20 U.S.C. § 6316(b)(4), and an opportunity also must be provided to students to transfer out of the failing school. 20 U.S.C. § 6316(b)(1)(E). If the failure to make adequate yearly progress continues for another year, the school is subject to restructuring, which can include replacing the school's administration, reopening the school as a charter school, hiring private managers to run the school, or providing for state takeovers of the school. 20 U.S.C. § 6316(b)(8).

c. NCLBA Preempts the EEOA.

As *Castaneda* and *Flores* both recognized, the EEOA does not define an equal education opportunity and it does not define appropriate relief. In contrast, NCLBA is detailed, specific, and mandatory with respect to opportunities, standards,

and remedies. Under the preemption doctrine, the later, more comprehensive and specific act, is deemed to create an exception to the earlier, more general act. *See, e.g., Brown v. G.S.A.*, 425 U.S. 820, 834 (1976) (under the principle that "a precisely drawn, detailed statute pre-empts more general remedies," court holds that sec. 11 of the Equal Employment Opportunity Act of 1972 pre-empts sec. 717 of the Civil Rights Act of 1964 in federal job discrimination). *Cf. Louisiana Pub. Serv. Comm'n v. F.E.C.*, 476 U.S. 355, 368 (1986) (preemption of state law implied "where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law . . . .") Congress's preemption of *Lau* injunctions becomes even more apparent considering that in *Flores* and *Castaneda* the standards for determining a denial of equal education opportunity, and the remedies for a denial, were made by courts to fill gaps left by Congress. Courts had no choice. Now NCLBA closes the gaps, and makes a *Lau* injunction obsolete.

7. CONCLUSION.

For these reasons the Court should deem the State to have purged the contempt order.

RESPECTFULLY SUBMITTED on March __, 2006.

LAW OFFICE OF DAVID CANTELME, P.L.C.
Exhibit 1 to motion to intervene

Appendix G

By: David J. Cantelme
3101 N. Central Avenue, Suite 720
Phoenix, AZ 85012
(602) 200-0104
Attorneys for the Speaker of the Arizona House of Representatives and for the President of the Arizona Senate

CERTIFICATE OF SERVICE

I CERTIFY THAT ON, 2006, I mailed a copy of the foregoing to:

The Honorable Raner C. Collins
United States District Court
Evo A. DeConcini U.S. Courthouse
405 West Congress Street, Suite 5170
Tucson, AZ 85701-5051

I FURTHER CERTIFY that I electronically transmitted the attached document to the Clerk's Office using the CM/CEF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Timothy M. Hogan thogan@aclpi.org
Joy Herr-Cardillo jherrcardillo@aclpi.org
Lynne Christensen Adams ladams@lrlaw.com; cmarino@lrlaw.com
Jose A. Cardenas jcardenas@lrlaw.com; kwochos@lrlaw.com
David A. Garner jgarner@lrlaw.com; pnavarro@lrlaw.com
James J. Sienicki jsienicki@swlaw.com
Ronald W. Messerly rmesserly@swlaw.com

Appendix G

Keith F. Overholt	koverholt@jsslaw.com
Michael J. Farrell	mfarrell@jsslaw.com
Susan P. Segal	susan.segal@azag.com
Eric J. Bistrow	EBistrow@bcattorneys.com

Appendix G

ARIZONA HOUSE OF REPRESENTATIVES JOURNAL OF THE FORTY-SEVENTH LEGISLATURE, SECOND REGULAR SESSION (MARCH 8, 2006)

NORMAN MOORE
CHIEF CLERK
1700 WEST WASHINGTON, SUITE H
PHOENIX, ARIZONA 85007-2844
PHONE: (602) 926-3032
FAX: (602) 417-3084
nmoore@azleg.state.az.us

Arizona House of Representatives
Phoenix, Arizona 85007

March 8, 2006

I HEREBY CERTIFY that the attached is a true and accurate copy of the portion of the Arizona House of Representatives Journal of the Forty-seventh Legislature, Second Regular Session of Wednesday, March 8, 2006 which contains a motion made by Representative Tully and passed by roll call vote.

/s/ Normal L. Moore
Normal L. Moore
Chief Clerk

Appendix G

Motion by Mr. Tully:

Whereas, even though the House of Representatives believes it is clear under the House rules, the Arizona Constitution and case law, that the Speaker of the House of Representatives is authorized to represent the entire body in various matters, including litigation, but nevertheless the Arizona Supreme Court in Bennett v. Napolitano did not recognize this authority.

Therefore, I move that the House of Representatives, Forty-seventh Legislature join with the Senate to move to intervene in the case of Flores v. State, U. S. District Court cause CIV92-596-TUC-RCC, to represent the interests of the Legislature in this case and to defend the new state plan for English language learners as enacted in H.B. 2064 passed by the Legislature on March 2, 2006 and allowed to become law by the Governor on March 3, 2006. To accomplish this purpose the House authorizes the Speaker to represent the interests of the House of Representatives and take all appropriate action on its behalf in any matter related to the Flores litigation, including acting jointly with the Senate President to act on behalf of the Legislature as a whole.

Passed by the following roll call vote:

AYES 39: Allen J, Anderson, Barnes, Barto, Biggs, Boone, Burges, Burns J, Carpenter, Chase, Farnsworth, Gorman, Gray C, Groe, Hershberger,

Huffman, Jones, Knaperek, Konopnicki, Mason, McClure, McComish, McLain, Murphy, Nelson, Nichols, O'Halleran, Paton, Pearce, Pierce, Quelland, Reagan, Robson, Rosati, Stump, Tully, Weiers JP, Yarbrough, Speaker Weiers J

NAYS 21: Aguirre A, Alvarez, Bradley, Brown, Burton Cahill, Cajero Bedford, Downing, Gallardo, Garcia M, Kirkpatrick, Landrum Taylor, Lopes, Lopez, Lujan, McCune Davis, Meza, Miranda B, Prezelski, Rios P, Sinema, Tom

Appendix G

CHARMION BILLINGTON
SECRETARY OF THE SENATE

Arizona State Senate
Phoenix, Arizona

March 8, 2006

I HEREBY CERTIFY that the attached is a true and accurate copy of the portion of the Arizona Senate Journal of the Forty-seventh Legislature, Second Regular Session of Wednesday, March 8, 2006 which contains a motion made by Senator Bee and passed by roll call vote.

/s/ Charmion Billington
Charmion Billington
Secretary of the Senate

1700 W. Washington, Senate Wing, Room 2003, Phoenix, AZ 85007
Phone: (602) 926-4231; Fax (602) 926-3429 EMAIL: cbilling@azleg.state.az.us

Appendix G

Motion by Senator Bee:

Whereas, even though the Senate believes it is clear under the Senate Rules, the Arizona Constitution and case law, that the President of the Senate is authorized to represent the entire body in various matters, including litigation, but nevertheless the Arizona Supreme Court in Bennett v. Napolitano did not recognize this authority;

Therefore, I move that the Arizona State Senate, Forty-seventh Legislature join with the House of Representatives to move to intervene in the case of Flores v. State, U.S. District Court cause CIV92-596-TUC-RCC, to represent the interests of the Legislature in this case and to defend the new state plan for English language learners as enacted in H.B. 2064 passed by the Legislature on March 2, 2006 and allowed to become law by the Governor on March 3, 2006. To accomplish this purpose the Senate authorizes the President to represent the interests of the Arizona State Senate and take all appropriate action on its behalf in any matter related to the Flores litigation, including acting jointly with the Speaker of the House to act on behalf of the Legislature as a whole.

Senator Bee requested a roll call vote. Support for a roll call vote was supported by Senator Burns. The motion passed by the following vote:

Appendix G

AYES 17: Allen, Bee, Blendu, Burns, Cannell, Flake, Gray, Harper, Hellon, Huppenthal, Jarrett, Johnson, Leff, Martin, Tibshraeny, Waring, President Bennett

NOES 13: Aboud, Aguirre, Arzberger, Brotherton, Cheuvront, Garcia, Gould, Hale, Miranda, Mitchell, Rios, Soltero, Verschoor

Appendix H

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MIRIAM FLORES, individually and as parent of Miriam Flores, a minor child, et al., Plaintiffs, vs. STATE OF ARIZONA; et al., Defendants.	No. CV92-596 TUC-RCC **ORDER**

Pending before the Court is the Plaintiff's Motion for Civil Contempt (Docket No. 671). The Motion has been fully briefed by the parties and the Court held a non-evidentiary hearing on this matter on August 27, 2007.

Civil contempt sanctions are non-punitive and avoidable, as such there are fewer procedural protections required before the imposition of such sanctions. *U.S. v. Ayres*, 166 F.3d 991, 995 (9th Cir. 1999) (quoting *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994)). Therefore, a court may impose sanctions in an ordinary civil proceeding upon notice and an opportunity to be heard. Id. at 827, 114 S.Ct. 2552. The Plaintiff specifically sought sanctions against the Legislative-Intervenors for contempt. However, the Plaintiff's motion clearly seeks contempt sanctions for the failure to comply

with the Court's Order on March 22, 2007. All the Defendants were present at the hearing and all Defendants responded to the Plaintiff's motion. As such the Court finds it appropriate to consider the motion for civil contempt against all the Defendants.

This case has been pending before the Court since August 20, 1992. However, the actions relevant to the Plaintiff's Motion for contempt have occurred since the March 22, 2007 Order was issued. After an evidentiary hearing, the Court found HB 2064 impermissibly imposed a two-year limitation on funding for English Language Learners (ELL) instruction and impermissibly took into consideration federal funds received under the Elementary and Secondary Education act in determining the amount of funding available to districts and schools. Additionally, the Court found although HB 2064 instituted a system of cost-based funding using instructional models to be developed by a task force to be implemented for the 2007-2008 school year, until the task force models were funded, the ELL programs still were funded arbitrary and capriciously and bore no rational relation to the actual funding needed to insure ELL students the mastery of the State's academic standards. The Court ordered the State to comply with the Original Order by the end of the 2007 Legislative Session.

Prior to the end of the 2007 Legislative Session no action was taken to comply with the Original Order. According to the Legislative-Intervenors on September 20, 2007, the ELL instruction models were approved by the Task Force and finally able to be published to all Arizona school

districts. However, since the models were not approved until after the 2007-2008 school year had begun, the Legislative-Intervenors contend the earliest schools could receive funding rationally related to help ELL students overcome their language barriers that impair their equal participation in public schools is the beginning of the 2008-2009 school year.

A party can be held in civil contempt when there is clear and convincing evidence a party willfully violated a specific and definite order of the Court. F.T.C. v. Affordable Media, LLC, 179 F.3d 1228, 1239 (9th Cir. 1999).

In this case, there was a specific and definite order of the Court. The Court's March 22, 2007 Order, "[o]rdered that the State has until the end of the current Legislative Session to comply with the Original Order." The Original Order found the State's funding of the ELL programs bore no rational relation to the actual funding needed to insure the ELL students could achieve mastery of the State's academic standards. In the March 22 Order, the Court held HB 2064 was not in compliance with the original order in three ways.

First, HB 2064 impermissibly imposed a two-year limitation on funding for English Language Learners (ELL) instruction. The Court's Order, until altered, amended, or vacated, invalidated this provision.

Second, HB 2064 impermissibly took into consideration federal funds received under the Elementary and Secondary Education act in determining the amount of funding available to

districts and schools. The Court's Order, until altered, amended, or vacated, invalidated this provision. Although the Structured English Immersion Budget Request Form sent to the schools requests information about federal funds and describes the Federal funds as off-sets, so long as the federal funds are not considered when the State appropriates a rational amount of funds for the ELL programs there has been no contempt of the Court's Order with regard to this provision.

Finally, the Court found that "[o]nce the State has chosen an instructional method, it must provide sufficient funding to implement that method." The Court's Order did not appropriate these funds. It is undisputed when the Legislative Session ended these funds still were not appropriated nor was there any attempt to appropriate these funds. Therefore, by clear and convincing evidence the State willfully violated the clear and specific March 22 Order of the Court.

Once the moving party has shown the willful violation of a clear and specific order, the burden shifts to the contemptuous party to show why they were unable to comply. *Affordable Media*, 179 F.3d at 1239. In this case, the State, which includes the Legislative and Executive branches, can certainly comply with the Order of appropriating funds for the ELL programs. The State's only defense to inability to comply is that they were unable to accumulate the required information from the schools in order to rationally fund the new models for the ELL programs.

Appendix H

According to the Legislative-Intervenors, now that the models have been published to the schools, the only steps remaining are for the school districts to complete the budget forms and submit them to the Superintendent who will then submit them to the legislature. The Legislature can then appropriate the funds and the Governor can approve them. As the Legislative-Intervenors admit, it is possible for the ELL programs to have the rational amount of funds appropriated for the 2008-2009 school year by the end of February 2008. Therefore, IT IS HEREBY ORDERED:

The Plaintiff's Motion for Civil Contempt (Docket No. 671) is GRANTED.

FURTHER, the State of Arizona is ORDERED to appropriate funds for the ELL Programs that are rationally related to helping ELL students overcome their language difficulties in compliance with the Court's March 22, 2007 Order by March 4, 2008.

FURTHER, if on March 4, 2008, the State fails to comply with this Order, the Court will then levy appropriate sanctions.

FURTHER, it is ORDERED that all Defendants, including the State of Arizona, the Superintendent of Public Instruction, the State Board of Education, and the Legislative-Intervenors use their best efforts within the powers granted to them by the Arizona Constitution, Arizona Statutes, and the Arizona Regulations to ensure compliance with the March 22, 2007 Order by March 4, 2008.

FURTHER, since the Plaintiff's Motion for Civil Contempt is granted, it is therefore ORDERED the Defendants are to pay Plaintiff's reasonable

attorneys' fees in connection with the prosecution of this civil contempt proceeding. Plaintiff's counsel is to submit calculations for said attorney's fees and a proposed order for the Court to approve.

DATED this 10th day of October, 2007.

/s/ Raner C. Collins
Raner C. Collins
United States District Judge

Appendix I

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MIRIAM FLORES, et al., Plaintiffs, vs. STATE OF ARIZONA; et al., Defendants.	Docket No. CV92-596 TUC-RCC Tucson, Arizona January 10, 2007 9:17 a.m.

[BUTTERFIELD, T-2, 31-35]

Excerpt from Testimony of Karen Butterfield

* * *

p. 31

. . .

Q. Okay. So the parents can get their 6 youngsters into it, the principals can get their youngsters into it, and the teachers can get their youngsters into it?

A. Correct.

Q. This has been going on now for about six years; is that right?

A. Actually, no, since -- basically since 2004-05, once the underperforming, failing schools were identified.

Q. Okay. So the last three years, then, more or less?

A. Correct.

Q. Is word getting out? Because that's always an issue, you can have a great program if it's not known, it won't be used. Is word getting out now, Dr. Butterfield?

A. I feel it is, and I think this list that is a part of the documentation here demonstrates the increase in the number of LEAs and charter schools and providers who have taken advantage of this state

p. 32

tutoring fund.

Q. Now, Dr. Butterfield, I said 41 and I was wrong. How many have you actually got on this chart?

A. It's close to -- I believe it's around 198.

Q. How many school districts have we got in the state? In the 230s?

A. Yes. Yes.

Q. That tells me that most districts are getting this help if they want it; is that fair to say?

A. Correct, that's fair to say.

Q. Nogales ever been turned down for anything they wanted out of this fund?

A. No.

Q. Let's move on to the next one. And this is where we come to the 41, I believe.

Now, Dr. Butterfield, explain to us, if you would, what this next fund, this AIMS intervention and dropout prevention, is intended to do?

A. Again, as statute 15-809 specifies, it is focusing on those high school students who are at risk of dropping out and who need assistance and AIMS Intervention/Dropout Intervention strategies.

Q. Now, when did the legislature create this program?

A. It was created in --

p. 33

Q. Since 2000?

A. Yes.

Q. How is this program funded, if you would, please?

A. This is funded by the state legislature.

Q. How much money did they put in this year?

A. We now have $5.2 million in the fund.

Q. Okay. Has the amount grown under the superintendent's leadership with the legislature's cooperation?

A. Yes, it has.

Q. Explain how it's gone up.

A. When I first came to the department within the Title V arena in November of 2003, at that time there were only five to six participants in the program, with approximately $500,000, and then in 2005-2006 we offered two rounds of funding opportunities for the additional $5 million.

Q. So there was $500,000 -- make sure I got this right -- 500,000 to start with, 5 million more has been added to it?

A. Correct.

Q. Each year?

A. Well, let me clarify. The very first year that this program began, which I think was around

p. 34

2000, 2001, there was only one grantee for $50,000. After that it gradually increased with a variety of funding sources, mainly from the state.

Q. Okay. Now, if we're up to 41 and if my mental arithmetic tells me, we're about 20-percent coverage of our districts in Arizona?

A. Yes.

Q. Nogales part of this one?

A. No, they're not.

Q. Why not?

A. They just did not apply for the funds specifically.

Q. Okay. Explain that process to us, if you would, please, the application process, how it works.

A. The application process is a competitive grant process, and the Department of Education provides specific grant application training so that applicants will have a very strong application so that they will not be denied funds, and then the ADE sets up a grant review or application review committee, goes through those applications and then begins the awarding process.

Q. Do any districts not get a grant?

A. Yes.

Q. Why not?

p. 35

A. Two applicants did not receive funds last year.

Q. Two out of 43?

A. Correct.

Q. What happened to them?

A. They just did not meet the criteria of the grant whatsoever or had a very poorly written application.

Q. Is there help so they get better for the next year?

A. Yes, oh, we provide feedback and if -- many of those two did request feedback regarding, you know, what did we do that -- why didn't we get funded, what can we do better to give us a stronger chance of getting the funding later?

Q. So these two districts know what they didn't do right and they can fix it for next year?

A. That's correct.

* * *

[BUTTERFIELD, T-2, 42-49]

Excerpt from Testimony of Karen Butterfield

* * *

p. 42

. . .

So the state average about one out of two, Nogales two out of three?

A. Correct.

Q. They're doing better than the rest of the state?

A. Yes, they are.

Q. Then let's go to the next item, please.

A. Percent of ELL students who were tutored in Nogales who passed at least one part of the AIMS test was at the state average of 35 percent.

Q. So our children that didn't speak English to start with that are learning it, one out of three of them has been passing AIMS?

A. Correct.

Q. In Nogales?

A. In Nogales.

Q. About the same for the whole state of Arizona, though; correct?

A. That's correct.

Q. Okay. Going to the next item, Dr. Butterfield, the percent of reclassified students.

p. 43

A. The percent of reclassified students in Nogales who again passed at least one section of the AIMS test was at 95 percent.

Q. Now, these are the young men and women that didn't speak English to start with but got English in Nogales?

A. Yes, and they were exited from the program.

Q. They're doing pretty good, then, aren't they?

A. Yes, because the state average is 68 percent.

Q. So more than nine out of ten of those children that learned English in Nogales are passing AIMS?

A. That's what this shows.

Q. And that's not true for the state of Arizona 15 as a whole?

A. Correct.

Q. But in the state as a whole still 68 percent, or more than two-thirds, are passing it?

A. Yes.

Q. For our reclassified or our children who have learned English in Arizona schools?

A. That is correct.

Q. Let's move on to the next item, please.

A. The next set is measuring the percent of all students in Nogales who passed all three sections of

p. 44

the AIMS test, and that is at 27 percent.

Q. Now, to make sure I've got this right, Dr. Butterfield, this is not limited just to seniors?

A. Correct.

Q. So you got sophomores --

A. Excuse me. For that particular pot of funding it was for the juniors only who had failed AIMS.

Q. Okay. Let me just talk about AIMS for a minute so we can be sure on what children are taking it and when they're taking it. We actually start with our sophomores; right?

A. That's correct.

Q. They get their chance to pass AIMS?

A. Correct.

Q. They pass it, they're done with it, they don't have to mess with it anymore?

A. That's correct.

Q. They don't make it, they come back as a junior?

A. That's correct.

Q. They try it again?

A. Correct.

p. 45

Q. Now, they don't make it as a senior, you don't graduate anymore?

A. That is also correct.

Q. Okay. That's why it's given over three years?

A. Yes.

Q. So kids really get a third chance or more?

A. Actually, they have five opportunities to pass the test.

Q. Five chances to pass AIMS. Those that aren't making it, you've got the special help for them?

A. Yes, we do.

Q. Now, let's come back to where we were. Of the juniors that got this one-shot 10 million, those juniors in Nogales, 27 percent passed?

A. Correct. All three sections of the test.

Q. Now, if you pass one section, you don't have to take that -- you don't pass the rest, you don't have to take that section over again, do you?

A. That is correct.

Q. So if you pass, I don't know if it's math or whatever it is, if you pass it you're done with it?

A. That is correct.

Q. Okay. How about statewide?

p. 46

A. Statewide that percentage is only 2 percent.

Q. Now --

A. Back in 2005.

Q. In 2005 27 percent of our juniors in Nogales passed all of AIMS, only 2 percent statewide?

A. Correct.

Q. What's Nogales doing right? Something.

A. Something is right there.

Q. Okay. Then let's move to the next item. Percent of ELL students tutored in Nogales. Now, once they fail, that's when you start giving them tutoring; is that it? Have I got that right?

A. Correct.

Q. Okay. So the ones that aren't making it, you find them, you start teaching them special, they might pass or may not. How many actually did pass?

A. Well, it was 10 percent of the ELLs in Nogales, that junior group.

Q. How did we do statewide?

A. Only 2 percent.

Q. Okay. Then the last item, percent of reclassified students, those are the kids that have learned English in our schools in Nogales who passed all of AIMS?

A. The reclassified students, that percentage

p. 47

was 63 percent who passed all three sections.

Q. Now, those are the reclass --

A. Reclassified.

Q. That got the special tutoring?

A. And they were exited from their ELL program.

Q. Unfortunately, statewide it's not as good?

A. Back in 2005, correct.

Q. Okay. Now, what are we doing to fix it?

A. First of all, within the Title III English Acquisition Services Unit, with the SEI endorsement, with all the teacher training we are doing with SEI strategies, with the focus on ensuring that every student graduates on time with a diploma, I feel schools are taking this very seriously and school leaders and teachers have much better resources and tools at their fingertips than they ever had before.

Q. It's a new day, isn't it, Dr. Butterfield?

A. Yes, it is. The landscape has dramatically changed.

Q. You've been teaching in Arizona or working at the State Department of Education about 30 years or more, if I got it right?

A. That is correct.

Q. Since 1975?

A. Correct.

p. 48

Q. You've seen a lot of changes?

A. Yes.

Q. How about a lot of changes in the last six years?

A. Many changes in the last six years.

Q. And since Mr. Horne became superintendent?

A. Mr. Horne since becoming superintendent has made it a mantra for us at the department to do everything we possibly can to provide technical assistance and service to our schools, teachers, principals and superintendents, and that we are doing.

Q. He does pretty well with the legislature, doesn't he?

A. Yes, he does.

Q. Is he getting help from the legislature?

A. I feel he is. We've gotten additional funding for these two big programs over the last two years.

Q. Let's turn to the next page, Dr. Butterfield, please.

Ma'am, we've got a bar chart there?

A. Yes.

Q. Tell us what that tells us, please.

A. This chart breaks down specifically the percentage of Nogales student who were tutored back in

p. 49

2005 within the specific AIMS areas of the test that they took and how they did in comparison to the control group, which was Santa Cruz. And the bar

graph clearly shows that Nogales did better than the control group who was not tutored.

Q. Now, when you say Santa Cruz, there's a school district called Santa Cruz and there's a county called Santa Cruz. Which are we talking about?

A. This is the school district.

Q. Is that in the Tucson area?

A. Yes. South of Tucson, I believe.

Q. So if we take Nogales and we look how it's doing and compared to how the Santa Cruz district is doing, which is doing better?

A. Nogales.

Q. What are you doing to try to help Santa Cruz?

A. Making sure that they're applying for funds.

Q. Okay. So the money is there for these tutoring programs, we got to make sure that all our districts are putting their hands in to get some of that money?

A. Correct.

* * *

Appendix I

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MIRIAM FLORES, et al., Plaintiffs, vs. STATE OF ARIZONA; et al., Defendants.	Docket No. CV92-596 TUC-RCC Tucson, Arizona January 11, 2007 10:00 a.m.

[COOPER, T-3, 212:10-213:15]

Excerpt from Testimony of Kelt Cooper

* * *

p. 212

. . .

Q. Now, I want you to go back to the Hennings affidavit, which is the first page of Exhibit 213, and look at paragraph 4 of that particular affidavit.

A. Yes.

Q. It says, "Attached as Exhibit 2 are statistics showing the current student-teacher ratios for different grade levels within NUSD," and then he specifies the goal, and then he says, the last sentence, "The goals for student-teacher ratios have been met in most schools for most grade levels, as are reflected on Exhibit 2."

Now, was Mr. Hennings' affidavit, which is dated April 2, 2000, was that affidavit correct when

he gave it with regard to his statement that the goals were essentially reached as of March 20, 2002?

A. Yes.

p. 213

Q. And what do you attribute that to? What accounted for the dramatic reduction in class sizes?

A. Again, I think both our efforts to identify residential fraud was one. We invested a great deal of internal research to make sure that we -- and came up with systems to try and angulate our data, and we stayed on top of that regularly. And in addition I think the enforcement of the open enrollment policy as it was modified from the existing board-approved policy, not the one that was in practice, had a great deal of influence on the class sizes.

We were able to better predict student enrollment and we were able to reallocate our resources throughout the district once we had a handle on what was going on and control it.

* * *

Appendix I

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MIRIAM FLORES, et al., Plaintiffs, vs. STATE OF ARIZONA; et al., Defendants.	Docket No. CV92-596 TUC-RCC Tucson, Arizona January 12, 2007 10:15 a.m.

[COOPER, T-4, 5:10-7:4]

Excerpt from Testimony of Kelt Cooper

* * *

p. 5

. . .

Q. Okay. Let's talk about practice. Did they have some practices -- institutional practices which made difficult the hiring of good teachers?

A. Yes.

Q. All right. Now, did one of those practices have to do with how much credit was afforded teachers moving into the district?

A. Yes.

Q. All right. Why don't you explain that?

A. Not atypical or untypical of other districts in the state of Arizona, Nogales credited years of experience up to five years as a standard, so if a teacher came in from out of state or out of district

with 25 years of experience as a public school teacher they would be typically credited only five and -- from out-of-district credit.

p. 6

Now, there was a provision and policy that allowed the superintendent to exercise some discretion on an individual case to award additional credits based on their experience, but typically it was across the board five credits for -- five years of credits for experience outside the district.

Q. Did that affect the pay of a particular teacher if they got five years as opposed to full credit for all their experience?

A. Certainly. The practice itself limits mobility and the opportunity for people to leave districts and seek other opportunities because of the cost differentials. Even if you have a district up the road eight miles and there's a highly qualified teacher you'd like, by that standard you're not likely to recruit them because they could lose thousands of dollars by making the eight-mile move.

Q. Now, was that policy changed?

A. Yes.

Q. And what effect did that have in terms of your ability to hire more qualified teachers?

A. Well, it opened the doors considerably and it had an impact on our recruiting strategies. We were going less and less out to job fairs to recruit. I think word got out that we were giving year-for-year

p. 7

credit, so we had a great number of people coming in and out of retirements up in Tucson and driving all the way down because it was very well

worth the travel time for that type of increase in their salary.

* * *

[COOPER T-4, 18-22]

Excerpt from Testimony of Kelt Cooper

* * *

p. 18

. . .

Q. Now, while you were there what did the Nogales Unified School District do to correct this decentralized, unsystematic function that you just described? What happened?

A. Well, recognizing -- and it was a shared. I mean, there were other people in central office that viewed this as not wise practices from a fiscal management standpoint, deposits of money. We wanted to run a very exceptionally tight business office as well, and some of the practices at the site levels were in some ways compromising our ability to make everything squared up.

But regarding to the textbooks, we brought in teams of teachers by content areas grades K through 12 and invited publishers to come in and take a look at

p. 19

the various textbooks that could be purchased and had the teachers select their best pick. And we made sure that we said that when they're looking at the textbooks they need to be cognizant of the connections, the -- in the process of examining and

selecting textbooks that they would need to make sure that the content mirrored what the state required as far as the objectives so we would have some connectivity with the standards, some alignment with the standards.

From that point on we basically took the money away from the principals and put it into a common book -- textbook fund, and we organized a system, and I have to give credit to our business manager because she's the one who has to juggle all the pieces. But our objective was to outfit all the students in the elementary schools the first year with brand new textbooks selected by the teachers. The second year would be to fill out the middle schools, and finally to upgrade all the senior -- the high school students on a three-year staggered approach.

Q. Did you, in fact, do that?

A. Yes, we did.

Q. And were these new textbooks that were purchased, were they to your knowledge aligned to the

p. 20

state academic standards?

A. As best as you can. Some of the materials, of course, needed to be -- there were some gaps in it. The text in math series, for example, lacks a lot in geometry in the fifth grade area, and that's part of the materials being tested at the state and what they're expected, so in those circumstances when we identified those gaps in the materials with the textbooks, schools were then allowed to purchase supplemental materials that would address those

issues and weave that into their instruction in scope and sequence.

Q. And so if I can just summarize, number one -- in response to the problems that you had, number one, the Nogales Unified School District centralized its textbook purchases; is that correct?

A. Correct.

Q. You put together committees of teachers to select new textbooks that were aligned essentially to the state's academic standards; correct?

A. Correct.

Q. And then you put the Nogales Unified School District on a textbook purchasing adoption cycle, starting with the elementary schools and then the middle schools and then the high schools; correct?

p. 21

A. Correct.

Q. Now, were there advantages in terms of economies of scale in centralizing your textbook purchases?

A. Yes.

Q. What were those advantages?

A. Well, there's two things from an academic standpoint, too. Well, we recognize that some of the bigger states in the United States often drive what's found in the textbooks, so it's very important in this process that we -- we're looking at alignment with our standards, not necessarily those of Texas or California. So buying in bulk, you know, you might get some of these salespeople that will say, look, you buy these books, and the principal may buy $32,000 worth of books and they'll promise to come in and do a little brief inservice, but the profit margins for

those salespeople and the publishers are so minimal with those small purchases that they seldom ever own up to their promises of coming in and doing staff development training, going over the books and whatnot.

So when buying in bulk, when you're buying 500, $650,000 worth of textbooks at a given shot, these publishers will send their representatives in.

p. 22

They often kick in some additional materials at no cost because you're buying in bulk and it's very worth their while then to do so. So you're getting a lot for your dollar when you're buying in bulk.

But that's an economic one, but more importantly it's a process of alignment so that students have contemporary materials and that they are alike so we can then design our periodic assessments within the school year.

Q. At the time that you left Nogales Unified School District were you aware of any shortage of materials at the schools in the Nogales Unified School District?

A. No. Although we would occasionally get requests from principals, we were still fighting with principals to go out and start collecting the lost book funds, and they don't like to -- they didn't frequently like to confront parents about paying back for a lost book, so there may have been some requests to replace missing textbooks even then.

But as a whole, no, they had books, kids had books, they had classroom sets, and they were standard, and they were contemporary, much different than it was in 2000 and years past.

Appendix I

* * *

[COOPER, T-4, 43-47]

Excerpt from Testimony of Kelt Cooper

* * *

page 43

. . .

Q. Did this include ELL students as well?

A. Yes. All students.

Q. Now, we spoke earlier about methods by which the Nogales Unified School District was able to free up some monies. We talked about economies of scale with regard to textbook purchases, instructional materials, we talked about aides. I now want to talk to you about addendums.

Can you tell the Court what you found with regard to addendums when you first arrived at the Nogales Unified School District? And, well, let's first, what are addendums?

A. Addendums are funds or -- yeah, funds that are available to teachers for doing extra, additional duties or work. For instance, if you sponsor a chess club, there may be some monies associated with sponsoring that club, we would call that an addendum.

Q. All right. When you got to the Nogales Unified School District in August of 2005 what -- what were your findings with regard to these addendums?

A. Well, there were several findings. First we found that there were great disparities on the addendums from each campus. Again, this is an

p. 44

artifact of decentralization of decision-making that had been going on for a number of years to the extent that principals had some discretion on what they would want to pay a sponsor for, like, a chess club, say, a chess club fifth grade. On one campus you might have one principal requesting an addendum amount for $250 whereas you might have another fifth grade chess club sponsor at another elementary school being paid $1,000.

So that was an issue, and that was not just an issue that we saw as kind of awkward, but the teacher association also had issues with this, and in our dialogue with meet and confer and the professional relations committee these frequently came up as things that they felt were unequitable or inequitable between campuses, that they felt in certain circumstances that these addendum amounts were tailored towards individuals on the campuses that were in favor with the principal versus those who were not in favor, whatever.

So we spent a lot of time, and it's a continuous process of refining it. So I think we came down to a point where we said you're entitled to have three different addendums here associated with a small list of options that they could use, but they were

p. 45

going to be uniform across the board. So maybe one principal didn't want a chess club, but they wanted to have a cheerleading squad, but they were valued at the same amount given the amount of time. We did these algorithms and came up with

some type of matrix to justify equity within these programs.

And also two other artifacts occur. Over time, well, one is just the way you understand principals work. I was there, I did the same thing, which is if you can acquire certain resources one year and can maintain those even though you don't have a need for it, for instance, I have a chess club one year, or a quilting club, and it's valued at $2,000 as an addendum to my campus, and I request that a second year but I no longer have that club, that money is still coming into that campus and the principal knows that that will be money that they can later divert into the areas they want. It becomes their built-in slush fund.

I call it a shell game, and they do that sometimes with personnel as well, they'll make a legitimate claim for a position and then suddenly they'll transfer another person around and then another one around, and all of a sudden that original need goes away and now they have extra resources on

p. 46

their campus. Just a shell game.

So we examined all these to find out if, indeed, there were students participating in these programs, which ones had been extinct for 10 years or more and still were getting funded, and we started to eliminate those funds and hone it down and get a grasp on that.

Q. Was there any kind of issue with regard to credit card purchases?

A. Oh, yeah. There's dozens of different means in which resources are bled off of a school district, and, again, I've come from a district that was the fifth poorest in a huge state, and so you needed to account for every single penny. There was no -- there was no fat in the budget whatsoever. You had to know exactly where every mop was and every dustpan was and each one had a value because we were that broke.

And we learned over the years, for instance, if your coaches go out on a scouting expedition for football, say, for instance, that, given a credit card, that they may fill up at the beginning of their road trip on an empty tank, go do their scouting, come back and fill up again on the same credit card, thus getting a full tank of gas.

So these types of practices within a district

p. 47

can be better managed. And then we began to say if you're going to use -- you can use a school vehicle and have a school car and you can fill it up with the school credit card because then the gas stays within -- it's our property, it's our resources. If you're using your own vehicle, then, of course, you will be reimbursed on a mileage basis rather than given a credit card and fill it up.

So that way you start to eliminate these little bleeders that occur, and there's dozens and dozens and dozens of bleeders in the school system, you're constantly trying to find and come up with procedures to make that less of a bleed.

Q. So you tightened up your credit card policy. I want to talk to you about -- is that correct?

A. Correct.

Q. Was there an issue when you got there with regard to release days for teachers?

A. Yeah. Yes.

* * *

[COOPER, T-4, 53-54]

Excerpt from Testimony of Kelt Cooper

* * *

p. 53

. . .

Q. Did the board adopt your recommendation?

A. No.

Q. Why not?

A. There's -- boards operate sometimes along political lines, and it was one of those things that I don't think they wanted to bite the bullet on.

Q. When you were at the Nogales Unified School District did you institute a concept known as zero-based budgeting?

A. In a broad, general sense, yes.

Q. What is meant by zero-based budgeting?

A. It's where you have to justify each and every year what your expenditures are. And I think that most business managers would prefer that type of analysis. Meaning too often you'll find that if the district comes in with a three-percent increase or a two-percent decrease in their revenue one of the easiest methods of budgeting for the subsequent year is just to apply that uniformly across the board.

Q. Was that happening at the Nogales Unified School District?

p. 54

A. I think to a large degree it was, but I think there were some serious efforts that were under way to stop that practice, and we began to hold meetings with the principals and ask them to justify their programs by student enrollment, interest, any number of criteria that they would use to justify maintaining a program or a position unless -- just a uniform was add 3 percent to the budget across the board. And it's a much more sensible approach, a zero-based budgeting concept, because it causes people to seriously reflect about what's happening in the schools programmatically, logistically, and make them consider different priorities than just assuming that a three-percent increase is going to be a three percent across the board. It's too easy and doesn't really solve -- a zero-based budgeting approach is a very diagnostic approach and it has a positive effect on budgets but also has an institutional positive effect as well.

[COOPER, T-4, 57-69]

Excerpt from Testimony of Kelt Cooper

* * *

p. 57

. . .

Q. Now, at the Nogales High School -- at Nogales High School, were there issues in Nogales High School

p. 58

with regard to drugs and gangs and things of that nature?

A. Yes. Nogales is a -- you want me to go --

Q. Go ahead, explain.

A. Okay. Nogales is a very interesting border community in that there's a fair amount of wealth compared to a lot of other border communities, and it's cleaner than you'll find in towns such as Laredo, Brownsville, Matamoros, even El Paso and Juarez, I mean, it's an entirely different feel there. The gangs per se are episodic. You can see that, when I first got there, within the first year we began to see graffiti that was reminiscent from my experiences down in the valley. What we call the valley is El Paso, not the valley up in Phoenix. And then you began to see certain characteristics in student dress and behaviors at certain schools.

So you would have episodes of emergence of gang, gang activities, but it wasn't endemic as you would find in Ebantito, Fabens, El Paso, those different areas on the border. But we would have episodes where it was clear that gangs were trying to assert themselves within the schools, junior highs and high schools, especially the high school, and it would manifest itself in behavior of the students, fighting

p. 59

in the schools, and we quickly suppressed that and worked on it very quickly because we didn't want it to become completely endemic into the system.

It was one of my greatest concerns because I was so thrilled that in El Paso County you see this

all the time and it's just something you struggle with, and I was praying that we would never have to endure this as a long-term issue, but, yes, on occasion we'd have periods, long periods, perhaps months and months where we'd have to address gang issues and really clamp down on dress, behaviors, kicking kids out of school if necessary to get the message across.

The drugs on the other hand, again, is very endemic. It's in the schools. Everybody will say that they have drugs in all high schools, and I think that's reasonably true. But because our kids tend to dress and behave quite well, they don't look like headbangers and they don't wear fishnets and they don't -- there's a few ghoully looking students and the dress code dress, but by and large they're very handsome, well-dressed young people.

But it's clear that there's an endemic issue with drugs in the schools and it's a serious issue there in the schools.

p. 60

Q. Was there ever an undercover operation at the Nogales High School?

A. Yes, there was.

Q. And were there numerous arrests?

A. Yes, there were.

Q. Now, I don't know if you were here when Irene Moreno testified that she went to the Wade Carpenter Middle School and it was in some sort of period of transition. What issues were there at the Wade Carpenter Middle School, if you can explain that to the Court?

A. Wade Carpenter is in an area of town of lower income, subsidized housing. There were issues -- we tried to paint it up, put grass and clean it up, make it look a little better on the outside, but there were some systemic issues, social political aspects, you had some teachers that were -- had their own way of doing things and their own little clique. That was a constant battle between the site administrator and that little group. The SES of the students was much lower than at the other middle school.

THE COURT: The what?

THE WITNESS: Socioeconomic status.

So it was a poorer side of town. And it had its own unique set of challenges, and it was a tough

p. 61

School District were the ELL students making progress?

A. Yes.

Q. Was a new principal installed in that school?

A. It's my understanding, but not during my tenure.

Q. Now, at the time that you left the Nogales Unified School District did the Nogales Unified School District to your knowledge essentially solve all of the problems that are discussed in the original *Flores* opinion, namely quality teachers, material shortages, textbook shortages, class size ratios? Were those essentially solved at the time that you left?

A. The schools were cleaner and better organized than they had been before, and I don't remember all the details of the decree, but the

schools were much cleaner, much safer when I left than they were when I got there.

The textbooks, yes, as described, it was a horrible mess and there's some system in place now I think, and the kids have textbooks, and we were able to do that.

Class sizes were down. It took a lot of work and a lot of political finagling there because it was a hot topic, but we were able to reduce class sizes.

As far as quality teachers, you know, it's

p. 62

like any school district. We had a really good number of teachers that were very, very sharp and some really good, young, budding administrators as well, so I have to give compliments. I have been in some districts where there was just absolutely administrators that had sludge for brains, and these ones were sharp people, they meant well, they just needed some additional training, and many, many teachers there were very, very sharp.

The issue of hiring teachers that didn't speak English was I think an artifact of a philosophy that emanated from the '80s and '90s in that district, which was to create a well-rounded, bicultural, biliterate student, and it was by design that they were hiring and sponsoring teachers from Mexico to teach in the schools who didn't speak English because that wasn't the priority.

It was an issue when I got there, and so we reduced that, I think we had maybe three, and I believe that was a fight because our human resource director didn't then want to sponsor it because of the paperwork related to sponsoring people from another

country has gotten so tough. But we had two or three that spoke English well and had good technical backgrounds and content areas that we continued to

p. 63

sponsor and keep, but by and large if they didn't speak English and they couldn't write a paragraph and they couldn't communicate well enough, we wanted quality teachers and we did away from that practice. But I will -- I want to say that at least everybody still has a need to select the best teachers possible, and I would say that you have to stay on top of it, and when you get new teachers in that are not cutting it you get rid of them right away and try to keep on bringing in the best and maintaining the best.

So I would say that it's a whole lot better than it was. It's no different than any other district in the United States trying to get some of the best teachers possible. Everybody is dealing with that one.

Q. At the time that you left in the schools such as Vasquez De Coronado, Challenger, Bracker, were you generally happy with the quality of your teachers at the Nogales Unified School District at the time that you left?

A. All schools?

Q. All schools.

A. I was happy to know that we made some significant improvement to the schools. When I left I was pleased, I felt that I did a good job, that I was

p. 64

part of a group that did some pretty neat things there. I was -- I left there with some sincerely beautiful feelings toward people in our programs. We

saw some programs really take off and do great. I've since seen some principals at conferences that have developed into some topnotch speakers, and I'm proud. It's like being a dad seeing your kids graduate. You see some really cool things going on, and I was pleased.

Was it a perfect district? I think all districts need improvement, and it's usually time for someone to step in and try to take it to the next level. But I was pleased, very exceptionally pleased with the people we worked with and how we were able to get systems to start functioning together. Because that's -- it's like hearing a well-tuned vehicle, and it just felt like it was getting there and it was moving and we saw some of the product.

So when I left I would say there was still -- it's a hundred million things that I can dream up and say I still want to do this and do that, but when I left I left with my chin high, knowing we did a very, very good job, and was very pleased that the quality of education was better for those kids than it was when I got there. So it was much better when I left

p. 65

than when I got there.

Q. Towards the end of your tenure did anyone of the Nogales Unified School District ever come to you and say, "The ELL programs don't have enough money"?

A. No.

Q. You indicated in your deposition that more money will not make the difference for students, or ELL students unless there are structural changes in

the way schools are operated. What do you mean by that?

A. Well, if you continue to do what you do as you've done it, I don't think there's any way you can expect anything but the same outcomes. You can infuse the system with additional funds, but as long as there's bleeders and when there's incompetence or there's disconnection between systems within your organization, if things are not tightly aligned, if you're not -- if you don't have a supportive board, for example, in some of the efforts that you do --

And it's not just the policy aspect of them approving a policy, it's standing by and supporting the efforts and understanding that some of the benefits of your work are not going to show for a year or two or three, that they have to have faith and these kind of things need to be in place because money

p. 66

is not necessarily the answer. In fact, in most cases it's a matter of management, it's a matter of getting the social dynamics in the right alignment as well.

I don't -- it's like there's this parasite in the school systems that drain away resources from the student body, and that includes inefficiency, ineffectiveness, ineptness, politics, political hierarchies and prioritizations of funds rather than those things focused in on the student, philosophies that contradict good common sense, such as hiring teachers that don't speak any English simply because there's some greater bicultural issue going

on, and the kids aren't getting to learn English, it's compromising that whole thing.

All of these things you can find in any and every single district, which are just parasitic and draining away the resources of bringing a focus in. Until they get these things shored up it doesn't matter how much money you put in, those resources are drained off and don't do any good for the student. You need to clean up the organization and make sure it's highly managed and highly efficient to even begin to suggest that money might make a difference because good money after bad is still money tossed away.

Q. At the time that you left the Nogales Unified
p. 67
School District were the ELL students making progress?

A. Yes.

Q. Were they learning English?

A. Yes.

Q. Were many of them meeting the AIMS requirements?

A. Yes.

Q. We hear a good deal about what the state should do and what the school districts should do. Do parents and students also have responsibilities with regard to the education of students?

A. Yes.

Q. And what are those responsibilities?

A. Oh, they're innumerable, but I'll give you an example as it applies to Nogales.

Principals were concerned about the number of students that were absent in school. Again, I come from a tradition where after three or five absences

the parents can be held responsible and in contempt of court and fined, and I've sat in a lot of those before the magistrates where they'd actually fine parents for kids not coming to school. In Nogales there are instances where students were missing in the first semester 40 and 50 days, complete days of attendance in the elementary schools.

p. 68

Responsibility of a parent is to make sure, especially at the primary grades, elementary, to get those kids to school. Get them to the bus. Get them to the school. Don't just hold them out because it's a little drizzly or a little bit of snow and keeping them at home. We began to work closely with the County Attorney, Marty Chase at the time, and it was hard work. For some reason there was some resistance to start sticking it to the parents that were allowing this to happen. But before I left we were just finally getting a system in place that identified the parents, and we were to work through the juvenile probation office and the magistrates to start getting the parents held responsible for their kids to be in school. That's one.

As long -- and that's a pervasive deal down there. That's a parent issue and it's trying to work with law enforcements and the courts to make sure that there's some teeth in there to get those parents to do it because otherwise we're fighting a desperate situation when it comes just simply with attendance in the elementary schools.

Now, we got the support of the courts, they said get us to this point and we'll do it. So I don't know, that took several years just to get the dialogue

p. 69

and get the word out that we were going to stick it to the parents if they didn't get their kids there. We saw some, but the mechanism never was fully implemented. But that would be an issue where parents need to be responsible. Parents need to make sure the kids are not hiding stuff under their beds, the kids are not lying that they're doing their homework, they're accessing -- we went to an automated system where parents can have access to their students' attendance and grades through our Power School Program, and if they don't have any Internet they can go to the local library and access it through there. We give them a pin number. It's very common anymore and parents need to be responsible for getting into it.

Q. And do students themselves also need to be motivated and read their lessons and do their homework?

A. Yeah. That's standard. That's 1920 on. I mean, you have to work with kids and their parents and have high expectations and hold people responsible and accountable.

* * *

[COOPER, T-4, 78-79]

Excerpt from Testimony of Kelt Cooper

* * *

p. 78

. . .

Q. So what did you do about that?

A. Well, we came up with an assessment department, began to pull up all the data that we could, getting it organized. We later brought in different folks from the school district, created a research and development department instead of a bilingual department to oversee the security distribution and data input of our scores. And we were -- and I don't know if it's still in place or if it was fully activated, we were looking at a data warehouse system that we would collect our SAIS data, every piece of data that we could on any individual students into a common template that we could then look at and do research with or, you know, do some studies and analysis with. So we were in the process, and it's an ongoing process, of making sure that there's a system of getting not only the data out but the data back,

p. 79

and because there are different measurements to come into a system, a warehouse system, an electronic warehouse system that we can access it and slice and dice the numbers as we need to. So that was a work in progress. And I was seriously disappointed with a district that size not having at least some semblance of data management when I got in because it's a fairly decent-sized district.

Q. So by what year do you -- did you think that you had gotten the data problems resolved such that, for example, if the system identified a student as an English language learner you could be confident that student was actually an English language learner?

A. Probably around 2003. And I think part of that was in assistance with Proposition 203, or I

think it was 203 when we began to start doing annual assessments for all students in the ELL programs, even if they'd been exited, because up to that point I wasn't even confident that anybody had done any kind of reassessments. In fact, I recall finding when we started digging in there were some students that hadn't been reassessed in probably four or five, six years, and I'd seen that in other districts, too, because it's just sloppy data management and clerical work.

* * *

Appendix I

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MIRIAM FLORES, et al., Plaintiffs, vs. STATE OF ARIZONA; et al., Defendants.	Docket No. CV92-596 TUC-RCC Tucson, Arizona January 10, 2007 9:17 a.m.

[FAGAN, T-2, 185:3-186:23]

Excerpt from Testimony of Thomas W. Fagan

* * *

p. 185

. . .

Q. So what HB 2064 requires is that in determining the amount of state aid you offset the federal funds as specified in the legislation; is that right?

A. It requires that the state aid amount be offset by these federal dollars.

Q. Now, if legislation like HB 2064 had been presented to you while you were with the U.S. Department of Education, would that have raised any concerns?

A. Oh, boy. Certainly would have, because this seems to be on its face inconsistent with federal law regarding both supplement, not supplant and the

provision that governs the state aid and taking into account federal dollars when determining the amounts of it for a district.

Q. Does the fact that the statute, as compared to the preexisting situation, increases group B weights make any difference in terms of that analysis?

A. No.

Q. Does the fact that the state might end up giving more money on top of the group B weights make any difference in terms of that analysis?

p. 186

A. No, because you're still dealing with the offset and taking into account the amount of state aid a district will receive based upon the amount of federal dollars it has.

Q. Now, Mr. Fagan, it has been suggested I believe perhaps at your deposition as well that if the use of federal dollars is restricted in the way that you have just suggested, then what we end up is gold-plating Arizona's programs because we would so drastically reduce the use of federal funds. What's your response to that?

A. Well, I don't believe we're talking about gold-plating here, but if the state is convinced that that is, indeed, the case, then they can return the money to the federal government and it will go to states that are in need of it.

Q. Mr. Fagan, during your 29 years at the U.S. Department of Education and all the time that you were involved in handling Title I policy and making determinations regarding supplement, not supplant restrictions, did you ever see anything like HB 2064?

A. I've never seen such a blatant violation of the law.

* * *

Appendix I

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MIRIAM FLORES, et al., Plaintiffs, vs. STATE OF ARIZONA; et al., Defendants.	Docket No. CV92-596 TUC-RCC Tucson, Arizona January 17, 2007 9:44 a.m.

[GARCIA-DUGAN, T-5, 103-114]

Excerpt from Testimony of Margaret Garcia-Dugan

* * *

p. 103

. . .

Q. When did you obtain your master's degree?

A. I believe I received my master's in 1977.

Q. And what was that area?

A. Secondary education.

Q. Have you been a teacher?

A. Yes, I have.

Q. When was your first teaching job?

A. My first teaching job was in the Murphy Elementary School District. I was an 8th-grade teacher that taught all subjects. That was for one year.

Q. And what year was that?

A. That was the year -- 1973-74 school year.

Q. After teaching 8th grade in the Murphy Elementary School District where did you teach?

A. I left the Murphy Elementary School District after the '73-74 school year and acquired a job in the Glendale Union High School District at Glendale High School.

Q. And for what period were you a teacher in the Glendale Union High School District?

A. I was an English teacher, speech teacher, and

p. 104

variety of other courses I taught for 13 years.

Q. From 1974 to 1986?

A. Yes, sir.

Q. During that 13-year period did you teach ELL students?

A. Yes, I did. I began teaching English language learners around 1976, I believe.

Q. And during this 13-year period that you taught at Glendale High School can you give us some sort of idea about the demographics of the school?

A. Glendale High School is situated in downtown Glendale. It is the mother school of the Glendale district, which is comprised of nine schools. It has the lowest socioeconomic groups of children. Mainly their demographics are -- it's now what they call minority majority school. When I was a teacher at Glendale we had more Hispanics than any other school in the district. At that time we probably had close to 40 percent Hispanics, 60 percent other, and then later it's now become basically I believe 70 percent minority with about 65 percent Hispanic.

Q. During the years that you taught there did you have a transient population?

A. Yes. Glendale has always been known to have students that come in and leave. It's, like I said,

p. 105

the lowest socioeconomics, and that usually happens in those type of schools.

Q. Now, you indicated that it is low socioeconomically, so I take it that you had -- it was a Title I school?

A. Yes, it was.

Q. In 1986 did you acquire a new position with the Glendale Union High School District?

A. Yes. In 1986 I transferred to Washington High School as a staff developer. My job was to train teachers how to teach.

Q. When you say to train teachers how to teach, how to teach English language learners?

A. Not specifically that. At the time around 1986 there was a big movement that schools needed to have what they call staff developers to train their teachers, new teachers coming in, just to better their skills and instructional delivery, and I was asked to apply for the job. I did.

At that same time that I left to Washington High School the entire English language program moved to Washington High School, so I think that was a combination of the reason I was sent to Washington High School.

Q. And how long did you have that position?

p. 106

A. I had that position for three years.

Q. What were the demographics like at Washington High School?

A. When I arrived at Washington High School, as I said, they moved the entire English language learner program from the other schools onto that campus. That became the center for all of the English language learner instruction. The demographics definitely changed when that population came on to that campus.

I would say before the English language learners came to Washington it was probably maybe 15, 20 percent, 30 percent minority and the rest it was Anglo students.

Q. And then after the change was made, it dramatically increased from that?

A. It dramatically increased, and all I remember is that we had 44 different languages at Washington High School when I transferred over.

Q. How many? I'm sorry.

A. About 44.

Q. What was the predominant language that was spoken?

A. It was predominantly Spanish, Vietnamese being the second.

Q. Now, during the -- now, you said you were at the Washington High School for three years?

p. 107

A. As a staff developer, and then I moved into an assistant principal of curriculum instruction for another three years.

Q. And what were your duties in that position?

A. My duties at that time really was to be an instructional leader in the sense of making sure that

the teachers were teaching the curriculum aligned to the assessment. Glendale Union High School District has always had a defined curriculum that teachers are supposed to teach to, and there's a districtwide assessment, and I was very familiar with that process, and so that's what I did, was mainly help teachers better their instruction. I built the master schedule in which we placed students in classrooms. I did evaluations of teachers and sponsoring of extracurricular activities at nighttime.

* * *

p. 108

AFTERNOON SESSION

THE COURT: You may proceed.

BY MR. BISTROW:

Q. Margaret, now, in 1992 were you appointed to a new position in the Glendale Union Unified School District?

A. Yes, I was.

Q. What position was that?

A. I became the principal of Glendale High School.

Q. How long were you the principal?

A. Ten years.

Q. What were your duties as principal?

A. Everything. High school principal is responsible for really managing the high school, the budget, making sure that the teachers are evaluated according to law, making sure that the teachers are teaching the academic standards that are set forth by the state, then any other duties that the superintendent gave me.

THE COURT: Can I ask you a question real quick?

THE WITNESS: Yes, sir.

THE COURT: How does the principal make sure that teachers are teaching to standards?

p. 109

THE WITNESS: The way that I made sure that our teachers were teaching to the standards is I looked at their scores on our districtwide tests, which was aligned to the state test, and I also observed teachers in the classroom, and I would have my observation notebook with me and I would identify the objective they were teaching and make sure that it was aligned to the outcomes that the state -- the state standards.

THE COURT: All right. Thank you.

BY MR. BISTROW:

Q. Margaret, I want you to turn to Exhibit 239. And is this an abbreviated summary of your resume?

A. Yes, it is.

Q. And I notice under Honors and Awards, maybe this is your number-one honor, Softball Coach of the Year for Skyline Division for 1977?

A. That is the award I'm most proud of.

Q. There's a award called Achievement Above All Award, Glendale High School, 1985. What did that award entail?

A. I believe -- well, the award I think started in 1984 in the district, and it was an award that was given to the top teacher of each of the high schools in Glendale, and each teacher from each of the nine

p. 110

schools was awarded or presented to the governing board during that year, and I was awarded the achievement above all.

Q. You mentioned under Honors and Awards that you were highlighted -- that you personally have been highlighted in three published books. Can you explain to the Court how you have been highlighted in these three published books?

A. The first book, Structured English Immersion by Johanna Haver, she has written a book regarding the structured English immersion and asked me several questions regarding structured English immersion.

The next one was a book written by Rosalia, who also testified, and there was a chapter in which Glendale High School and Thunderbird High School in the Glendale Union High School District was highlighted regarding English immersion.

And then the next one by Elaine McEwan, the Ten Traits of Highly Effective Principals, she chose principals throughout the nation. I've never met her personally, but she called me and asked me several questions regarding how I made sure that teachers were teaching the standards, how I made sure that there was discipline in the schools, and several other questions regarding how a principal is effective.

p. 111

Q. And you were highlighted in her book?

A. Yes, sir.

Q. As an effective principal?

A. Yes, sir.

Q. Now, 2002 did you acquire a position in the central office of the Glendale Union High School District?

A. Yes, I did.

Q. What was that position?

A. I was the administrator for curriculum and instruction.

Q. And what were those duties?

A. Those duties were to make sure that the districtwide test that was given to each -- that -- we had several tests that were aligned to the academic standards. For example, all of the English courses in the Glendale Union High school, math courses, science courses and so on, all of the schools administered these tests to our students in the Glendale Union High School District, and I was in charge to make sure that that testing went as prescribed with security, with grading and with results to the principals to allow the principals to know how well their schools were performing.

Q. I think you said there were nine schools in

p. 112

Glendale Union High School District?

A. Nine traditional high schools and then we have an alternative high school for students who have difficulties with the normal, traditional schedule, and it's called Metro Academy.

Q. What is the approximate school population of Glendale Union High School District?

A. It's kind of interesting, I just saw that this morning in the newspaper. Right now they have about 14,500.

Q. And you were the administrator for curriculum and instruction for how long?

A. A year.

Q. June 2002 to June 2003?

A. Yes, sir.

Q. In June 2003 did you take a position with the Arizona Department of Education?

A. Yes, I did.

Q. And were you doing some work for the Department of Education even prior to June of 2003?

A. Yes. I was asked by Superintendent Horne if I would come down to work as an associate for him. At that time it was in the middle of the school year, January of 2003, so the district allowed me to work part-time for them and part-time for Superintendent

p. 113

Horne as an advisor. I needed to complete my contract with the Glendale Union High School District, and so they allowed me just to do part-time work.

Q. Now, what position did you assume in June of 2003?

A. I assumed the position of the Associate Superintendent for Academic Achievement, which really supervised all of No Child Left Behind.

Q. And why did you take the position at the Department of Education? Why did you leave Glendale where you had spent your entire career and go to the Department of Education?

A. I decided to change my career at that time to go to the department mainly because of the English language learner, the law that had gone -- had been voted in the year 2000, Proposition 203. It had not

really been implemented to my satisfaction, and Superintendent Horne asked me to come down to make sure that we would put forth Proposition 203, the law, and to make sure that our students were given structured English immersion, the English language learners that is.

So that was the -- that was the number-one reason that I decided to go.

Q. I want to take you back to your years as an

p. 114

English teacher at the Glendale High School from 1974 to 1986. Did you teach ELL students during those years?

A. I believe I started teaching the English language learners around 1976, '77. And I taught them until about 1984, '85, I believe.

Q. And then they went to Washington High School; correct?

A. Yes.

Q. Now, did you also teach -- while at Glendale High School during these years did you also teach regular English-speaking students?

A. Yes. My assignment when I had English language learners, I taught them one period a day, one hour a day, and then the rest of my teaching assignment I taught regular English, which was either English 1, 2, which is considered freshman English, or other courses that were given to me to teach.

Appendix I

* * *

[GARCIA-DUGAN, T-5, 130-135:2]

Excerpt from Testimony of Margaret Garcia-Dugan

* * *

p. 130

. . .

Q. Did you have the research division of the Department of Education gather some data on how well students who were classified as English language learners in 2003 performed on the AIMS tests in 2005?

A. Yes, I did.

Q. When did you have this study done?

A. I believe it was in the spring of 2005.

Q. Why did you have the study done?

A. Maybe it was 2006. I'm trying to remember, was it last year?

Q. It was 2005.

A. 2005. Why did I have the study done?

Q. Yes.

A. Well, there was always questions to us: How are the ELL students doing? Are they doing okay?

There was some people out there say they weren't doing well because of structured English immersion, we still have the politics out there, the two factions, that bilingual education is a better way to instruct English language learners. So I've been given these questions since I've come to the Department of Ed.

So we ran the study. We decided what's the best way to figure out how our ELL kids are doing.

And so being that we had gotten at the department about 2003 -- and I felt this is really the first year

p. 131

that Proposition 203 was at least somewhat implemented, and I think now that it's become fully implemented as much as I think it needs to be, or should be.

But in 2003 we knew we were getting some inroads within putting through Prop 203, so I had the research and evaluation department find -- you know, put a study together and let's look at students who were ELL in 2003 and match those students to their scores of the AIMS test in 2005, and then let's rank them, let's find out what school is doing the best and let's go and find out why they're doing the best. So this is what came from that study.

Q. Exhibit 216 is the result of that particular study?

A. Yes. Each of these schools had to have at least 100 AIMS tests in order to qualify. I didn't want to put a school in there that only had three ELL kids because it wouldn't really give us the robust study I wanted. So I said we needed to at least have a hundred tests so we can at least make some determination.

Q. Now, I want you to go to Exhibit 216. And on the far left-hand corner of that exhibit you have a school code?

p. 132

A. Yes.

Q. You see that? What is a school code?

A. Every school has a school code in the state, and that lets us know what district they belong to.

Q. Then you have, of course, the school name is the next column?

A. Yes.

Q. And then you have number, and that is the number that refers to the number of tests?

A. Yes. Every student is given three tests, one in reading, one in writing, one in math, so that would be about a hundred kids.

Q. Okay. Then you have a percent pass '05?

A. Yes. What we did, we matched the students that we identified in 2007 as being English language learners, and then I wanted to make sure that they were still around in 2005 so I could see how well they had done on the AIMS test in 2005.

Q. So when you say percent pass in '05, for example, Gallego Basic Elementary School, 83.94 percent, which is according -- well, before we go into that, you have ranking?

A. Yes. They were the number-one school in the state.

Q. Then when we say percent pass '05, is that

p. 133

the percent who passed all three AIMS tests?

A. Yes, sir.

Q. Now, you'll notice that in the top ten schools you have four schools from Nogales, and can you read those, read off the names of those schools?

A. Vasquez De Coronado Francisco School, Robert Bracker Elementary, Lincoln Elementary, and Challenger Elementary.

Q. When you saw that there were four schools from Nogales Unified School District, did this provide you with some -- was this significant to you?

A. Yes, it was.

Q. And why was that?

A. Well, it was an isolated school. I mean, there were four schools from one district, and that was the only district that had so many schools, and I thought that to me says there's systemic things going on at Nogales Unified. When you have four schools in the top 10, you need to really look to see why that's happening, and to me it was exciting, I know that the Flores came from Nogales, I had heard that Nogales was doing well, I, you know, had nothing to base it on until I ran this study and then it pops out.

So I was very excited to see that we had one district that was really shining because we were

p. 134

trying to find some school districts in Arizona that we could find out what their best practices were so we could share those with other districts, and Nogales came out.

Q. Now, in terms of the average pass rate in the state of Arizona for all students, what is that average pass rate for all three AIMS?

A. Approximately 66 percent.

Q. And you had one school from Nogales, Vasquez De Coronado, which was at 77.86 percent?

A. Yes, sir.

Q. Now, through the course of testimony that's been elicited to date, and you've been sitting here in the courtroom, we have gone through numerous exhibits documenting how well ELL students have

been performing on AIMS tests, we've had discussions on norm reference tests and things of that nature, and you've reviewed many of these documents as well; is that correct?

A. Yes, sir.

Q. What conclusions do you draw from all of this data that's been before the Court in terms of how ELL students are doing in the Nogales Unified School District?

A. From all the data that I have reviewed on Nogales, I would say Nogales Unified School District

p. 135

is doing an exemplary job with their English language learners.

[GARCIA-DUGAN, T-5, 137:12-20]

Excerpt from Testimony of Margaret Garcia-Dugan

* * *

p. 137

. . .

Q. In your view has the State of Arizona taken gigantic steps to provide an appropriate English acquisition program for Arizona's ELL students?

A. I think we have provided a phenomenal infrastructure for districts to then take it, and within their competent teacher staff and their administration there's no reason why our English language learners are not learning English as quickly as possible.

* * *

Appendix I

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MIRIAM FLORES, et al., Plaintiffs, vs. STATE OF ARIZONA; et al., Defendants.	Docket No. CV92-596 TUC-RCC Tucson, Arizona January 9, 2007 9:58 a.m.

[MORENO, T-1, 12-15]

Excerpt from Testimony of Irene Moreno

* * *

p. 12

. . .

Q. Did you deal with English language learners?

A. Oh, yes. Not as many as once I left the little community, but, yes, we definitely dealt with English language learners.

Q. And what was your job after that? What job did you have after?

A. I got married and came -- moved to Glendale, and I was the reading specialist. I got hired in Glendale El, Glendale Elementary. I was a reading specialist there for a while because of my reading endorsement.

Q. During what period of time were you at the Glendale Elementary?

A. My gosh. From '77 until I left in 2001.

Q. And did you have various jobs while you were at Glendale Elementary?

A. I did. I did a first grade combination. I taught third grade as well, fourth grade, sixth grade. Seventh and eighth grade is where I finally finished. Oh, I did some Title I -- what do we call ourselves? It was the Title I coordinator type thing. We worked with students that were at risk. So

p. 13

I did that for a couple of years.

Q. And after you left Glendale Elementary where did you go?

A. Washington Elementary.

Q. And how long were you at Washington Elementary, from 2001 until when?

A. 2003.

Q. And then you took your -- essentially your current job --

A. Yes.

Q. -- at the Department of Education?

A. That's correct.

Q. What was your job title and your duties at the Washington Elementary School District?

A. I was a program specialist, and the work entailed professional development for teachers. I did some assessment in both languages at different sites, helped teachers with support for those particular second language learners.

Q. During the period of time that you worked in the Glendale Elementary School District did you teach ELL students?

A. Yes, sir, I did.

Q. When we say "ELL," that's English language learners; is that correct?

p. 14

A. That is correct.

Q. Is that the same thing as an LEP student?

A. Yes, it would be. Limited English proficient student, yes.

Q. That's the old term that we use, ELL; correct?

A. I believe that it's still reported as LEP in some of our federal reports, so --

Q. But ELL and LEP are one and the same thing?

A. Yes, sir.

Q. Over the years how many ELL students have you worked with?

A. Hundreds.

Q. What generally was the native language of these students?

A. Generally it was Spanish.

Q. Did you deal with other languages as well?

A. That came later. The languages, oh, I guess it must have been in the last 10 to 12 years. We had Bosnian kids, we had kids that were from Russia, we had Vietnamese, Korean, Chinese, Tagalog is a language of the kids from the Philippines, Arabic. Oh, gosh. Farsi was another one that we dealt with. So my Spanish wasn't of any value for those students.

Q. When you were at Glendale Elementary, the

p. 15

Glendale Elementary School District, why don't you describe for us how you worked with ELL

students so that they could become English-proficient?

A. Initially it was a bilingual program that we were in, which was -- I was in that I would say for about five years. Because the program didn't have any curriculum per se, it was wholistic, I made a switch, I decided not to stay in those programs, so we moved into a regular, what we call an ESL, which is English as a second language, which essentially wasn't too much different than the bilingual programs. After you do that for a while and work with these kids and you're realizing that they're not accomplishing what you really feel they need to, I made a change and I decided that these students needed to be taught the way other students were taught. Particular strategies that assisted in that would have been the graphic organizers, the small group type tutoring that went on. I did a lot of chants so that the language was heard regularly, a lot of manipulatives. Anything that was real visual that I would have used with my regular ed students that were struggling.

[MORENO, T-1, 18-20]

Excerpt from Testimony of Irene Moreno

* * *

p. 18

. . .

Q. And when you have transient schools, does that pose particular problems for an ELL learning program?

A. It does.

Q. Why is that?

A. Well, you lose the consistency, the students don't get -- again, the consistency. When they're moving and -- well, they don't get the consistency, I'm going to leave it at that.

Q. Now, do you consider yourself to be an expert in how to provide effective services in order to teach ELL students to become English-proficient and academically proficient?

A. I do.

Q. And this is based on your many years of experience?

A. It is, and being a second language learner myself.

Q. After 27 years of teaching English language learner students do you have an opinion as to the most effective strategies to use in educating English language students to become English-proficient?

A. I do.

Q. And what are those strategies?

p. 19

A. Structured English immersion I have found to be the most effective, and I believe that you see that nationwide with businesses, the Fire Department, immersion really is the route to go. You don't teach a student to become a proficient basketball player and not use the basketball. The same way with a pianist.

So in order to make them proficient in the language you use English.

Q. And do you feel the same way in terms of -- you mentioned you also are an expert in making ELL

students academically proficient. What strategies do you believe are the best strategies to use to make English language learners academically proficient?

A. Again, it's best practices, it's good teaching. If you're a good teacher, you're going to work at getting whatever student it is, whether it's a limited English speaker or a student that's limited in any academic area. Particular strategies are those that I've already kind of mentioned. The graphic organizers for one, it's just visual. Even if they don't understand something, they at least get a really good gist of what is going on in the classroom.

When you hear the language consistently, unless you live under a rock, there's no possible way that you wouldn't be able to glean some of that

p. 20

particular information.

When I did the professional development I very often told them, "I'm not giving you anything new, it's practices that you already have, we just need to dust them off and pull them out of our little bags and start using them."

The students really acquire the language and content-area academics the way other students do.

Q. Now, when you taught ELL students in the Glendale Elementary School District, were the ELL students segregated in their own classrooms or were they mixed with regular English-speaking students?

A. Again, depending on the site, if you were at a particular site they were -- you didn't have a choice, you didn't have a real mix of those particular students. One in particular was right in the barrio, so you had very few other students other than your

Spanish speakers, so there was some segregation. The district moved to make magnet schools so that they could be mixed, but again, it varied from site to site.

[MORENO, T-1, 33-37]

Excerpt from Testimony of Irene Moreno

* * *

p. 33

. . .

Q. And when you started at the department in April of 2003, can you describe the size and the quality of your staff?

A. There were six of us, including myself. One admin, one program project specialist and three education specialists. Only two of those education specialists actually had education background.

Q. When you came on board in April of 2003 were there some time-on-task issues within the English Acquisition Services department?

A. Yes, they were. The program specialists would go out monitoring, and when they came back the following day was supposed to be time off because they were out of the office doing particular monitoring, so that was an issue. They did that for a while because I was told that that was policy, if they were out of the office for a day then they took the next day off.

Q. Right. And did you change that policy?

A. Yes. I did get smart eventually.

Q. And what happened to the staff?

A. They all left.

Q. Now, over the years has your staff expanded?

A. Yes, it has.

Q. How many are in the English Acquisition Services department today?

p. 34

A. There are 16 of us, including myself.

Q. And have the duties of the English Acquisition Services department also expanded?

A. Yes, they have.

Q. In what way?

A. On top of additional monitoring that we're doing there is things that we had to develop. There were no proficiency standards in place. There's assessment pieces we have to do. There's technical assistance that we offer. There's professional development. We put on several conferences in the time that we were -- that I've been there, and we also have developed an endorsement. Of course, there are requirements, but that has definitely increased as far as the workload.

Q. Is the -- would you say that the English Acquisition Services department is a strong and effective department within the Department of Education, the State of Arizona today?

A. I would say yes.

Q. And do they work hard and long hours?

A. Yes. Very hard and very long hours.

Q. Now, you're aware that a new bill, House Bill 2064, passed into law in March of 2006; is that correct?

p. 35

A. Was it March? Yes.

Q. And were monies appropriated under that bill so you could further expand the staff of the English Acquisition Services department?

A. Yes, they were.

Q. Do you recall how much money that was, approximately?

A. I don't. I know that they've asked for 20 additional staff because we're looking at not only monitoring but actually evaluating and school improvement, and we want to be able to offer the technical assistance in order to get there.

Q. Are you currently advertising for additional staff?

A. Yes, sir, we are.

Q. And to fill approximately you said 20 additional positions?

A. We've filled some of those already, but 20 additional is what the bill stated.

Q. I think you've already mentioned this, but since you have come to the department in April of 2003 -- and I'm going to call it the English Acquisition Services department, EAS for short -- has EAS undertaken a series of initiatives to improve statewide the delivery of services to English language

p. 36

learner students since you arrived in April of 2003?

A. Yes, we have.

Q. And I want to go through some of these initiatives with you if I may.

A. Okay.

Q. First I want you to turn to Exhibit 202 in your book.

THE COURT: You said Exhibit 202?

MR. BISTROW: Exhibit 202, Your Honor.

THE COURT: Is yours in color?

THE WITNESS: It is.

THE COURT: So is mine.

BY MR. BISTROW:

Q. Now, this is a fairly thick document. Can you tell us what Exhibit 202 is?

A. 202 is our English Language Proficiency Standards. We were required by the federal government to have proficiency standards that were aligned and linked to our language arts academic standards, and that's what you have before you.

Q. Now, prior to the year 2000 did any such standards exist in the State of Arizona?

A. No, they did not.

Q. Prior to the year 2000 did school districts and charter schools in the State of Arizona create

p. 37

their own English language proficiency standards, assuming they even had them?

A. Because of the time involved, I would think that they probably didn't. They would go with whatever curriculum was in place in their schools. Our purpose was to facilitate their instruction, give them some guidance so that they would have an idea of where those students are proficiently in the language.

Q. Now, I want to be clear. When you speak of English proficiency standards, what do you mean?

A. Our standards cover K through 12, so you've got ELL I, II, III, IV and V. The standards tell you where the students are in their language, in their proficiency. You've got your beginning students or beginning area in all of the levels. ELL I is the kinder, ELL II is 1, 2 and 3 for second and third grades, and then ELL III comprises of 4, 5 and 6, and then IV is 7, 8, and then the last one is 9 through 12.

Each one of those levels gives you a proficiency of where those students are as far as their reading, their writing and their oral language.

* * *

[MORENO, T-1, 41-51]

Excerpt from Testimony of Irene Moreno

* * *

p. 41

. . .

Q. Now, do these proficiency standards from the point of view of the director of EAS serve important, broad purposes in the State of Arizona?

A. Yes.

Q. What are some of the purposes that these standards serve?

A. Well, it will allow those students to become proficient quicker and they would be able to exit the program itself. They would be proficient on that particular assessment.

Again, it's guidance for those teachers as a whole to be able to develop a curriculum and work around it. It also gives them benchmarks. It allows them to look at where the student is in order to be

able to, again, move them along, write the curriculum.

Q. Does this -- do these standards impact the curricula of school districts and charter schools?

A. I don't know that they necessarily impact it as much as they help guide it. The whole purpose of them is to give them guidance. It was something that wasn't there, it was a consistency that was missing, so now the teachers have something to look at, they

p. 42

have a way to move through programs in order to get these students where they need to be.

Q. So essentially they now can have standards from which they can develop curricula to meet the standards?

A. Yes.

Q. Now, are these proficiency standards correlated to Arizona's language arts academic standards?

A. They're actually aligned and linked to the language arts standards. That was a requirement.

Q. Can you explain that?

A. Those last two levels that we talked about, the early advanced and advanced --

Q. You're talking about level IV and level V?

A. Actually, you're looking at ELL I and you're moving across the way there, so you've got beginning, early intermediate, intermediate, early advanced and advanced. The last two columns are actually our academic standards already, so that's the linkage. We looked at the standards in order to

be able to write these so that there would not be a gap, so that everything kind of tied together.

Q. All right. So when you master the last two columns in each one of these standards, those last two

p. 43

standards are aligned to your academic standards in the language arts standards for the State of Arizona?

A. Yes, they are.

Q. Now, how did you go about developing these standards?

A. Again, our window was very short because they hadn't been done, so the federal government expected a finished product in a very short time frame, so we had the core developed by Susan Penatel (ph.), who was nationally known and had worked through our Arizona state standards. She gave us the core and then we went out and did, oh, my goodness, I believe it was nine focus groups all over the state, and in those nine focus groups we had 10 or 11 districts meet and we talked about them, we got input, we made some changes, and then once we came -- put those together we went out a second time and -- with those same schools, and that's how those were -- those came about. So it took almost a year's time, I guess, to finally get what we needed.

Q. And, as I understand it, these standards were approved by the Board of Education sometime in 2004; is that correct?

A. That is correct.

Q. So the standards have only been in place now

p. 44

for a couple of years?

A. Yes, that's right.

Q. Do you believe that these standards that have now been disseminated throughout the state to be critical in the delivery of instruction to ELL students?

A. Yes, sir, I do.

Q. Can you tell us why?

A. I feel like I'm repeating myself. Again, the guidance that it gives teachers, that consistency. There was no consistency for teachers. I know I would have loved to have had something like this in the classroom to be able to look at and know exactly where my students were. We spent a lot of time and energy differentiating your instruction in order to get students where they need to get.

This is a great assistance because, again, it gives you a benchmark, gives you somewhere or somehow to develop your curriculum. It's consistent statewide so if there is some mobility you know that that's going to be consistent when you come in.

Am I making sense?

Q. So if you have transient students, for example, who move frequently from one school to the other, they'll be dealing with the same standards?

p. 45

A. Absolutely.

Q. Do the standards also -- do they also provide a gauge by which the department can provide oversight and assure that ELL students are receiving instruction in order to meet those standards?

A. I think the gauge is more through the professional development and having them actually understand their purpose. Because they have not been in place long enough for us to be able to do that, I would hope with time that that would be the case. We spent a lot of time with professional development, explaining how these work, tie them into lesson plans and things of that nature so that teachers don't struggle, so that there's a comfort level that's entirely different than what we've been -- what we faced before.

Q. In your opinion were the creation of these standards a substantial advancement over what was in place prior to 2000?

A. I would say yes, because there was nothing in place.

Q. Kind of like going from zero to 10?

A. That's right.

Q. I want you to go to Exhibit 203, if you will, and which is a two-page document. And I want to go

p. 46

through that document with you, if I may.

A. Okay.

Q. First of all, with regard to the first page of this document, what is this document, the first page?
A. On the Exhibit 203 that we're looking at?

Q. Yes.

A. It is a correlation chart that we developed to share with our constituents. Teachers wanted to know where our assessment was aligned to our standards, so that's --

Q. When you say "standards," you're talking about your --

A. Proficiency standards.

Q. Okay. Now, when you talk about assessment, what are you talking about?

A. In this particular chart it's our proficiency assessment, which was the Stanford English Language Proficiency Assessment, SELP. And the levels -- when you assess the student, certain levels come up as far as proficiency. The teachers wanted to know exactly how those proficiency levels matched up with our standards, our performance standards, so that was developed for them to give them an idea. Again, we were trying to make things easier

p.47

for them and assist them in their instruction.

Q. Now, prior to the year 2000 were there any uniform procedures in the State of Arizona to identify and evaluate the placement of ELL students?

A. There were four assessments that were used statewide, and that's -- it wasn't uniform, depending on what district you were at. In my -- well, depending again, Washington used LOSS. Students came from another district, they hadn't been assessed with the assessment we had, we would reassess them.

The whole purpose of going to a single assessment was so that you have that consistency, everyone is on the same page. So the four -- I'm sorry, I veered away from your question again, didn't I?

Q. That's all right. Let me ask you this question. Did the state board in November of 2001 specify that

the department provide a method for identifying and placing ELL students?

A. Yes.

Q. Is there also a statute that requires that all ELL students who have language other than English be assessed by an examination?

A. Yes, that's true. That's also under Title III, or Title III federal ruling says that we

p. 48

have to identify students.

Q. Do the departments use any particular test to determine whether a student should be classified as an English language learner and the level of proficiency of that ELL student?

A. The SELP was approved by the board because of work that had been done through a task force. Again, we developed a rubric that was -- that looked at the proficiency standards. Again the requirement was that the assessment had to be aligned to our proficiency standards so that we were testing the right thing. So we developed a rubric using our proficiency standards. We went out for request for proposal, and five publishers sent in their materials for us to evaluate. We went through item by item of each one of those assessments that the publishers sent in the SELP, which is the Stanford English Language Proficiency Assessment by Harcourt, was the only one as closely aligned to our proficiency standards as it was. That was at 69 percent.

We did an alignment study ourselves, came out at 68 percent. The federal government said we should not be involved in the alignment study. We

went to the University of Arizona and adopted -- Jerry D'Augustino did that alignment study and he came out

p.49

at 69 percent.

Q. What does 69 percent mean?

A. It was 69 percent aligned to our standards. In other words, 69 percent of what we were assessing was being done with that particular test.

Q. And did SELP more than -- what does SELP stand for?

A. Stanford English Language Proficiency.

Q. Did SELP more closely -- was it more closely aligned to the proficiency standards than any other exam?

A. Yes. That was the reason it was selected.

Q. Now, today is every school district or charter school in the State of Arizona required to use a single standardized test?

A. Yes, they are.

Q. When did SELP -- when was SELP adopted?

A. It was '04-05 school year. I don't remember the month exactly. But it's been used in '04-05 and '05-06 was the time frame we used it.

Q. So SELP was used for two years, the '04-05 school year and the '05-06 school year?

A. That's correct.

Q. Now, did Arizona go to a new test?

A. Unfortunately, our federal program officer

p. 50

stated that we needed to have something more closely aligned than 69 percent. They wanted a higher alignment. Again, we always seemed to be a

little behind, so it was less expensive and easier to do an augmentation, so we took the SELP, kept 30 percent of it and augmented the assessment, and now we are calling it AzELLA.

THE COURT: Calling it what?

THE WITNESS: Arizona English Language Learner Assessment.

BY MR. BISTROW:

Q. And is AzELLA the new assessment test that is currently in effect?

A. Yes, sir, it is.

Q. And every school district and charter school in the State of Arizona in terms of assessing and evaluating ELL students must now use AzELLA; is that correct?

A. That is correct.

Q. Now, I want you to turn to Exhibit 204. And I don't want to belabor the point with regard to this particular exhibit. Can you tell us generally, first of all, these documents are labeled "Proprietary and Confidential" and you understand that all of these documents are proprietary and confidential; correct?

p. 51

A. Yes.

Q. And can you just generally explain what Exhibit 204 is?

A. That was the assessment we used the past two years. This is our Stanford English Language Proficiency Assessment.

Q. Now, we included in this packet some sample test questions, a couple of sample test questions; correct?

A. Okay.

Q. We'll just take one example. If you go to the middle grade level, the middle grade cover sheet.

A. Okay.

Q. And you go to the page right after that cover sheet, this is a Stanford English Language Proficiency Test for the middle grade level; correct?

A. Yes, it is.

Q. And that would be -- would that be ELL II or III as you described it before?

A. III.

Q. ELL III. Now, I take it that this page would be one of the sample questions that would be given to an ELL student; is that correct?

A. Yes. Actually, it's -- a sample is at the top. The test actually begins right after that.

* * *

[MORENO, T-1, 55-78]

Excerpt from Testimony of Irene Moreno

* * *

p. 55

. . .

Q. Prior to the year 2000 did the state itself as opposed to courses you could take at the university level, did the state itself, the Department of Education, provide assistance for teachers and administrators to obtain language endorsements?

A. The state, no.

Q. Now, under your direction has the Department of Education designed and implemented structured English immersion endorsements?

A. Yes, we have.

Q. And does Arizona now require SEI endorsements?

A. SEI endorsement is required of everyone that holds a teaching certificate, from superintendents on down to regular teachers.

p. 56

Q. So all administrators and all teachers in the state of Arizona now must have an SEI endorsement?

A. If they hold a teaching certificate, yes.

Q. Now, how was the SEI endorsement developed?

A. Oh, gosh. That was a very, very long process as well. We pulled together constituents. Generally our task force meetings, oh, gosh, we had as many as 30 to 35 LEAs, universities, community colleges all involved in that particular process. There was a lot of discussion as to what we wanted it to look like, the number of hours that it would entail. That truly took an entire year to put together.

We did come to consensus with every one of the task force meetings that we had. Again, every one of the universities was involved and, well, other -- Grand Canyon and then we had community colleges as well as our constituency.

Q. Now, as I understand it, there are -- well, why don't we do this. Let's turn to Exhibit 206. And Exhibit 206 is entitled Curricular Framework for Provisional Structured English Immersion Endorsement Training (15 Hours).

A. That's right.

Q. Now, are there two types of endorsements?

A. Actually, it's one endorsement, but one is a

p. 57

provisional which allows you to get through the process in pieces. It's a two-part, so you have a provisional that is good for three years and then you've got the additional 45 hours which constitutes the full endorsement.

Q. So a full endorsement then comprises the 15 hours, which allows you to have a provisional endorsement, and then 45 hours, so there's a total of 60 hours of work needed to get a full SEI endorsement?

A. That's correct.

Q. When, as I understand it, the provisional endorsement, every single teacher and administrator holding a teaching certificate in the State of Arizona must have had a provisional endorsement by August of 2006; is that correct?

A. August 31st of 2006, yes, that is correct.

Q. And what is the deadline for achieving the full endorsement by all Arizona teachers and administrators?

A. Full endorsement should be upon recertification, and that would vary. We need to keep in mind that the provisional is only -- is not renewable after three years. So, I mean, after the three-year period you can't renew it, so you would have to have it within that time.

p. 58

Q. You would then have to have your full endorsement?

A. Yes, sir.

Q. Now, the provisional endorsement entails I think you said 15 hours. Now, what kind of training

is undertaken or is provided with regard to the 15 hours for the provisional endorsement?

A. The 15 hours can be professional development or it can be a one-credit semester at a university. And what we do is approve syllabi providers, and once those are approved they're taken before the board, the board approves those providers, and then they're placed on the web site so there's an opportunity to go through the web site and find particular providers of that endorsement, the provisional.

We also have the Arizona K-12 center that's in partnership with ADE that offers the provisionals also working on the 45, and ASSET, which is on line also, has offered this.

Q. I'm going to get into the details a little bit on that.

A. Sorry.

Q. With regard to Exhibit 206, the first page of that exhibit, does that set forth the curricular framework for the provisional endorsement?

p. 59

A. Yes, that does.

Q. Does the second page of that exhibit set forth the curricular framework for the full endorsement?

A. That's correct.

Q. And what is the purpose of these endorsements?

A. Again, to give -- lift the comfort level of those teachers that did not work with second language learners, gives them strategies, gives them the foundations of SEI, why we are where we are. We talk about proficiency standards, which weren't in

place, and also the assessment, which are all keys, tools that we use as teachers. So it's -- and the reason for the administration is, as we are working with our constituents, the comments always were, well, they come to observe but they don't know what they're observing.

And so that was the reasoning there also, it gives everyone that comfort level of knowing what it is we're looking for and what is required to work with these students.

Q. Why is there a requirement that everybody have the -- at some point the full endorsement by 2009? Why not just those teachers who are involved in

p. 60

teaching ELL students?

A. And it wouldn't necessarily be 2009. I have to correct that quickly because that, I kind of have been stomped on about that, okay, so upon recertification.

The reason for that is because eventually, if you live in Arizona, you're going to encounter a second language learner. It may not necessarily be a Spanish speaker, but we've got people coming from everywhere and you need those strategies that help to get you to again lower that comfort level so they're no longer saying, "Those are your kids." You know, everyone takes part. This is all part of the education process.

Q. Now, there's a flow chart, which is the third page of Exhibit 206?

A. Yes, sir.

Q. Can you just briefly describe what is meant by this flow chart?

A. If you have a bilingual or an ESL endorsement, you don't have to have the SEI endorsement, you have had a lot of those strategies. The only thing, as we worked with the task force, was they asked that those teachers that have those look at assessment, an assessment piece, and also the

p. 61

standards. If -- well, can I take this apart?

Q. Sure.

A. If -- oh, it is on there, so people can kind of see, it's a little easier when you have that.

If you have that and you're grandfathered in, you don't have to worry about it, otherwise you end up having this. The only difference here is the new teachers, they then would have -- that would be provided at the university. The university then takes care of that.

If you're a new teacher to the state there's a reciprocity provision that's made for that, and I believe they have one year to complete that.

Q. Okay.

A. Is that enough?

Q. Yes.

A. Okay.

Q. Now, you mentioned that not all those holding a certificate have to have the full endorsement by 2009. Can you explain that?

A. Certain -- well, like Washington was one that moved on it immediately. As we worked with the constituents through those task forces they wanted

to have credit for the work they'd already done, so we allowed them that time frame, I mean the time frame

p. 62

that they'd worked. So if they got their 15 hours after 2001, we said, absolutely, you should have credit for that because it covered -- they helped develop the curricula framework, and what they -- the work that they had done, the studies that they had covered that particular area.

So the only difference with them is that they would not get the reimbursement piece that the other teachers would get, but they got credit for it. So some of those teachers would have to get it a little earlier.

Q. What do you mean "reimbursement"? Has the state reimbursed teachers for the training that they've received to obtain the SEI endorsement?

A. Yes. There was funding that was allocated for professional development in this area. So if you got your SEI endorsement, no matter where you decided to get it, the provisional, you were reimbursed a certain amount of money.

Q. By the State of Arizona?

A. Yes.

Q. In your professional opinion is this endorsement requirement critical to the instruction of ELL students?

A. I believe it is.

p. 63

Q. Why is that?

A. Again, the structure, the consistency. We have things in place for all other students, it's kind of

nice to see that, you know, we're looking at an assessment, we're looking at curricular frameworks, we're looking at proficiency standards. We're no longer a threat. It's no longer, well, somebody else can take care of these kids, because they have that particular training. Everyone needs to educate them, and now we're giving them tools to be able to do that.

Q. You mentioned that money has been provided by the state for teachers to obtain the training. Is this -- was this monies that were appropriated under House Bill 2010?

A. That's correct, it was 2010.

Q. And as I recall, and we -- that statute, that house bill is attached to your exhibit as Exhibit 208; is that correct?

A. Yes.

Q. And I believe --

A. Yes, it is.

Q. And Section 11 of that statute, the state appropriated $4.5 million for the purpose of providing funding for these endorsements; is that correct?

A. That is correct.

p. 64

Q. Does your department provide oversight of the endorsement process?

A. We do. We actually again evaluate the syllabi, make sure it covers the rubrics, we compare it to the curricular framework, and then we recommend it for approval to the state board.

Q. Has the Department of Education developed partnerships with entities to assist in providing SEI endorsements?

A. Yes, that partnership with the Arizona K-12 Center. They assured us that they would use the SIOP (ph.) method and cover the framework the way it was laid out.

Q. What is the SIOP method?

A. Oh, my, I shouldn't have said that because now I have to remember the acronym.

Q. Explain to us what it is.

A. It again is a structure that shows you how to teach English to students. And that was for -- from Dr. Janet Echevarria. She's written a couple of books, and it's called Strategies for Working with Your Second Language Learners or English Language Learners.

Q. You mentioned an organization I believe called ASSET. Is that one of the partnerships?

p. 65

A. That is the other partnership and that is done on line. That initially was done for free, so if you took the class on line teachers did not have to spend any money out of pocket. And they've reentered that and now the fee is a minimal $70 for it.

Q. Did any of these partnerships exist prior to 2005?

A. They did not.

Q. So these are new partnerships to provide SEI training that have been provided by the department since 2005?

A. Yes.

Q. Can endorsements -- I think you said endorsements also could be obtained at the university level. They now have courses in place for SEI endorsement training?

A. That is correct, and also some of the community colleges.

Q. Prior to the year 2000 did the Department of Education have a consistent outreach program to ELL educators in the state?

A. Not that I'm aware of.

Q. Since 2000 has the department developed monthly meetings within its staff and practitioners of English language learners?

p. 66

A. One -- I think it had to have been in '04, we created a practitioner of English language learner meeting. We have monthly meetings.

Q. Who are those monthly meetings with?

A. Our constituents. We invite teachers, community colleges come in. It varies. It's an open meeting. We have some administration that comes up. But generally it's our ELL coordinators and --

Q. When you say ELL coordinators, ELL coordinators from school districts throughout the state of Arizona?

A. Throughout the state of Arizona. We generally have anywhere from 100 to 150 LEAs present at our monthly meeting. We've had to change locations twice to accommodate.

Q. What is the purpose of having -- by the way, there's an acronym for this, it's called PELL, P-E-L-L?

A. That's correct.

Q. And I want to show you Exhibit 207.
Are these dates of your monthly meetings?
A. That is correct.
Q. Through 2006?
A. Yes.
Q. What are the purpose of these meetings?
p. 67
A. Initially it was just to disseminate information and answer questions. There were a lot of issues that come up, understanding things that are going on statewide, in particular EAS, and rather than having the wrong information out there, we just made it a point to be at necessary meetings and answer questions. They usually go from three to four hours. It's just a lot of conversation, a lot of anxieties are eased. Basically that's it.
Q. Do you get into technical issues at these meetings as well?
A. We get into all kinds of things at these meetings. Generally I tried to make sure that all the staff was there so that if there were data issues I had a data person able to do that, if there were fiscal application issues I had someone that could answer those fiscal application things. We have a Harcourt individual, doesn't work for Harcourt, it's EAS, but their expertise is in that particular area, so they are there. Then we have a monitoring person.
So I really worked trying to make sure that everyone that needed to be there was there so that we could answer all questions and not have to say, well, we'll get back to you.
Q. Has the department also designed and
p. 68

developed annual structured English immersion seminars?

A. Yes, we have.

Q. And did any of this exist prior to the year 2003?

A. Not to my knowledge.

Q. And what is the purpose of these seminars?

A. Well, we initially I think started as let's share this information. There was new laws in place, we needed to make sure that they understood it. For me truly it was to build more of a rapport, "We're not out here to get you, we're really here to assist you."

The whole purpose was to offer some technical assistance, to be able to tell you, you know, guys we want you to be in compliance, it's not an issue of, yeah, we're going to write you up or we want to write corrective actions. That was the whole thought, is just to be of service.

Q. Do these seminars provide professional development?

A. They do.

Q. Do they provide up-to-date teaching strategies?

A. They do. We have national speakers and we

p. 69

also make sure that we tap into our LEAs that are effective in different areas.

Q. You mentioned LEAs, and LEA is your local educational agency?

A. Yes, our districts' local educational agencies, yes.

Q. So when you say LEA you're talking about school district?

A. Yes, sir.

Q. Are materials distributed at these seminars?

A. Yes, they are.

Q. All the latest and best practices on how to teach ELL students?

A. We try to make sure that there is a strand of some of that involved. We also published additional standards to make sure that those are handed out. We put standards on CDs. I mean, we really tried to be as accommodating as we possibly can.

Q. How well attended are these seminars?

A. Very well attended. In particular this last one we had to cut our registration I think three weeks before we were ready to because we had reached our limit of 250.

Q. Now, in back of the first page of Exhibit 207 are the cover sheets of various seminars that you have

p. 70

provided since 2003?

A. That's correct. Some of these have been for the provisional, so we were -- we offered it through the department so those that attended could have actually received their -- the hours they needed for the provisional endorsement.

Q. So do you have breakout sessions at these seminars as well?

A. Oh, absolutely. Yes, there's several breakout sessions with national speakers, keynote speakers, and we really -- never mind. Oh, I'm going to say it. I really think it's a way of valuing these particular individuals because we have them at nice resorts. And the only reason I bring that up is we had a

national speller at our last conference and she says, "What a wonderful way to validate your ELL coordinators and the teachers of the state because you have it at wonderful places." So we really make it a point to do that.

Q. Now, prior to the year -- I'm going to change to a different subject now.

Prior to the year 2000 did the Department of Education have a consistent protocol for monitoring school districts to make sure they complied with federal and state laws?

p. 71

A. Not to my knowledge.

Q. Now, I want to show you Exhibit 209. Since the year 2000 has the department developed guidelines to monitor school districts and charter schools for compliance?

A. Yes, we have.

Q. Does the department require each school district to provide certain information?

A. Yes, it does.

Q. Do you require them to provide information regarding the number of ELL students classified for the first time?

A. Yes. I don't know if it's the first time. I have to throw that in there. We did not have reclassified actually requested anywhere, so, yes.

I'm sorry, I had to sort that in my head. I apologize.

Q. Well, what information do you require school districts and charter schools to provide?

A. When we monitor?

Q. Well --

A. Is that --

Q. You indicated that school districts and charter schools are required now to provide certain information, and one of the things you mentioned is

p. 72

the number of ELL students that are classified for the first time. What about the number of ELL students acquiring proficiency levels?

A. We need to have the number of students that are actually in the program, we need the number of students that are reclassified, and there needs to be a number of -- we need to know how many students have actually moved from one level to the next. I mean proficiency level.

Q. Under the Flores decree are there certain minimum requirements for monitoring?

A. Yes.

Q. And you understand the *Flores* consent decree?

A. I do.

Q. Can you tell us briefly what that consent decree requires?

A. The monitoring of 32 schools statewide. The top -- the first 12 or the top 12 are the larger number of districts that have the largest number of ELL students in that district. Then you have your next level, which is the middle numbers, so you monitor 10 of those particular schools. And then you've got those schools that have less are the last level. So it's a total of 32 schools that we have to monitor.

Q. Now, with the increased staff that you now have, have you been able to monitor more school districts than what is required by law?

A. Absolutely.

Q. How many -- can you tell the Court about that?

A. We actually have doubled the number of LEA districts that we are monitoring, and we are able to not just look at files, but able to monitor classrooms, speak to teachers, talk to administrators, do, you know, occasionally student-type interviews. So with the staff increase we've been able to get more of that done, plus offer more technical assistance.

Q. I just want to go through with you briefly Exhibit 209. The first page simply sets forth the requirements for monitoring; is that correct?

A. Yes.

Q. And then the next two pages are -- is the provision from House Bill 2064 dealing with monitoring; is that correct?

A. That is.

Q. Then the next document is entitled Overview of 2005-2006 Monitoring Results. Can you tell us briefly what that is, and then there's a series of documents that are attached to that.

p. 74

A. This actually gives you rule and it tells you what it is that we're looking for. Says each year the department shall monitor at least 32, and that was the 12 of the 50 LEAs with the highest enrollments, then 10 LEAs with LEAs that are not included in the 50 described, and then 10 that have 25 or less. So that's actually the rule.

The next page gives you an overview of what it was that we did. Some refer to technical assistance and monitoring, so we didn't just go in to do the

monitoring, which was look at files and things of that nature that I've already spoken to, but we actually offered technical assistance. Could be, you know, corrective action that they wanted to go over, maybe they weren't sure how to set up a particular program, maybe there were notebook issues that they wanted some help with. So those varied.

As you can see, it's described, there's technical assistance, the monitoring. There was complaints, we also went on complaints. If we get a written complaint from a constituent, we make it a pint to go to that district and then get back to the person letting them know what we found and try to take care of things that way.

Q. Irene, also in this exhibit you have attached

p. 75

a document called Monitoring Protocol. What is that? Do you see that there?

A. I do. This is what we give the LEAs or share with them so they know what to expect when we're coming.

Q. There's also, the last page of that particular document is a two-page document which is entitled SEI Classroom observation, English Acquisition Services Monitoring Checklist. Are these the kinds of things that you look at when you're out at the schools?

A. Yes, they are.

Q. Is this a form that was developed under your supervision?

A. Yes, it was.

Q. Now, you indicated in your prior testimony that with the House Bill 2064 you are already

advertising for what you hope to be 20 additional positions. Can you explain, what do you expect these new additions, these new employees to do?

A. We have always monitored for compliance. I think the thing at this point is looking for -- to offer the technical assistance. We want to be able to evaluate the school and put -- move them in a direction that would get everyone at the achievement

p. 76

mode that we need them to have. So it's more of an evaluation, technical assistance so that everyone in the state is making their AMAOs and AYP.

Q. In your opinion would these additional positions improve ELL education in the State of Arizona?

A. I'm saying yes.

Q. And is it your opinion that -- there are school districts in the State of Arizona today that in your view are doing quite well with their English language learner programs?

A. Yes, there are.

Q. Is one of the purposes of these additional personnel that's been provided under -- per the funding that will be -- let me -- I'm garbling this.

In terms of these 20 additional individuals that you are currently trying to hire, is one of the purposes of hiring such additional personnel to take the strategies and the lessons and the best practices from these school districts that are doing well and spread them to all school districts and charter schools throughout the State of Arizona?

A. That's our hope, yes.

Q. And with this additional funding do you believe there to be a -- well, strike that.

p. 77

Since you've been at EAS in 2003, with the expansion of your staff and the expansion of your duties, in your view has there been a substantial advancement in terms of ELL education in the State of Arizona?

A. Yes, I do.

Q. Now, Exhibit 210 is House Bill 2064; is that correct?

A. Yes, it is.

Q. Now, within the last couple of years did your office design and develop some structured English immersion models as guidelines for school districts throughout the State of Arizona?

A. We did.

Q. What was the purpose of those models?

A. Again, just guidance. Districts, as we sat through some of our PELL meetings and we made reference to the law, wanted to have some guidance, so we developed some models that we thought would fit in all the grade levels and shared them.

Q. How were the models developed?

A. Our staff, I mean, with just three of us, have over 70 years of teaching experience, so, you know, we did a lot of talking, read lots of articles and then did some compromising and came up with the

p. 78

models that we placed on the web site.

Q. By the way, does EAS have an advisory council?

A. It does.

Q. What is the advisory council?

A. The advisory council came together to revisit these particular models. They wanted more fluidity, they wanted something that gave them more leeway with what they were already working on. So we met, looked at the law and then talked about what they had in place, and -- and we haven't met in a while.

Q. Well, we talk about "models." You know, so that the Court is clear, what are "models"?

A. Models --

Q. "Models" are referred to in House Bill 2064. What are "models"?

A. It's the way, the structure and setup of a particular classroom. I think they go to the extent of looking at class size, curriculum -- oh, my goodness. It's -- the model is the way the program is set up for the SEI program.

Q. Now we have House Bill 2064; correct?

A. Yes, sir.

* * *

[MORENO, T-1, 184-192]

Excerpt from Testimony of Irene Moreno

* * *

p. 184

. . .

Q. And on the far left-hand column of that particular exhibit it has the fiscal years. That means -- when does the fiscal year of a unified school district end? June 30?

A. Yes.

Q. So fiscal year 2004 that's the 2003-2004 academic school year?

A. That is correct.

Q. And it states that there were 39 students reclassified in 2004, with a total ELL population of 3,888, and the percent reclassified was 1 percent. Do you see that?

A. Yes, I do.

Q. Then 2005 the number jumps to 23 percent. Do you see that?

A. Yes.

Q. Do you know what accounts for that significant jump?

A. Well, it could be two factors that I'm thinking about. With House Bill 2010 teachers were given incentive monies for each student they reclassified. It was $250 per ELL student that was reclassified.

p. 185

We also now have proficiency standards in place that are aligned to our academic standards, and if teachers had been using the academic standards to teach and because we're aligned with the new assessment being closer aligned to proficiency standards, that could be another reason.

THE COURT: I'm sorry to interrupt, but I need you to explain that to me again. A teacher themselves got an extra 250 if they got a kid reclassified? Is that what you're saying?

THE WITNESS: That is through --

THE COURT: In their own pocket?

THE WITNESS: In their own pocket.

THE COURT: All right.

BY MR. BISTROW:

Q. Now, in 2006 the percent reclassified jumps to 35 percent, and, again, what do you account for that?

A. I think it's our proficiency standards. I really believe that if they are teaching to the standards -- only because we already had standards in place. If those are being used when they teach the curriculum, ours are aligned and linked, our proficiency assessment is aligned to our standards, that would mean these students would do better and end

p. 186

up reclassified. That's my theory.

THE COURT: Did they get the same 250 that year, too?

THE WITNESS: No, they didn't that year.

BY MR. BISTROW:

Q. Now, the second page of Exhibit 218 is the AMAO report that we discussed previously for Nogales for fiscal year 2006; correct?

A. Yes.

Q. And I want to see if we can explain these numbers.

First, there is a column called grade range. These are K-2, grades kindergarten through second grade, third grade through fifth grade, sixth grade through eighth grade, and ninth grade through twelfth grade; correct?

A. That is correct.

Q. And then the next column is percent making progress in each of these grade levels; correct?

A. Yes.

Q. Now, what kind of progress must our ELL population in the State of Arizona make in order to make progress? What do they have to do?

A. They have to move from one proficiency level to the next. That means they have to move up a

p. 187

proficiency level. If they happen to be preemergent, they need to move to emergent.

Q. So let's talk about these different levels. You got preemergent?

A. Yes. Emergent.

Q. What are the other ones?

A. Basic, intermediate, and proficient.

Q. Now, according to this -- by the way, is the AMAO data provided by Nogales and then collated by the Department of Education?

A. Yes.

Q. So according to this particular report, in K-2 74 percent went from one proficiency level to another?

A. That is correct.

Q. And we could read all these percentages down the line; is that correct?

A. Yes, sir.

Q. For the year 2006 what percentage was required by the federal government in terms of gaining -- in terms of gains in proficiency progress?

A. We had set 12 percent. We move up one percent each year as we grow.

Q. And that is what the next column refers to where it says, "Met 12 Percent Progress"?

p. 188

A. That's correct.

Q. So in terms of a conclusion, what conclusion would you reach from these numbers that vastly exceed the 12 percent?

A. That perhaps the state has set their standards a little lower than they should have and we should all be striving to make at least 50-percent gain statewide. If -- again, if Nogales can do that, being a border town, certainly the rest of the state can manage to do just that. I mean, that would be what I would conclude, that perhaps we need to look at this a little differently and raise our standards.

Q. However, per No Child Left Behind Act you're in full compliance with federal law with these percentages?

A. Yes, we are.

Q. As a matter of fact, Nogales is vastly exceeding these percentages?

A. Yes, they are.

Q. Now, the percent reclassified, again we have the percentages, and what percentage -- what percentage of reclassification is required for the year 2006 by the federal government?

A. Twelve percent.

Q. And, again, the classification rates in the

Nogales Unified School District for -- in their AMAO vastly exceeds that?

A. Yes, it does.

Q. Then the last column is AYP?

A. That's right.

Q. And do a certain percentage of ELL students have to make AYP?

A. It is the same percentage.

Q. That's 12 percent?

A. Um-hum.

Q. What is AYP?

A. Annual yearly progress, and it's based on academic.

Q. Proficiency?

A. Yes.

Q. And those are your AIMS tests?

A. That's correct.

Q. Now, when you say 12 percent have to meet AYP, is that on all three AIMS tests?

A. Yes.

Q. Please turn to Exhibit 219.

Now, this is the Nogales Unified School District report card for 2005/2006; is that correct?

A. Yes, it is.

Q. Now, if you take a look at the far left

p. 190

column you'll see where it says 2004-2005. Do you see that?

A. Yes.

Q. And then 2003-04. Is that -- the results from these report cards are about a year behind; correct?

A. Yes.

Q. So the report card for -- in terms of measuring adequately yearly progress for 2005-2006, those report cards are not in yet; is that right?

A. Correct.

Q. So this is, in fact -- what we have on Exhibit 219 is the latest data from Nogales Unified School District or, for that matter, any other unified school district for the State of Arizona; correct?

A. Yes.

Q. I then want you to turn to Exhibit 220.

Now, this is a document that was provided to the movants in this case by the Nogales Unified School District; is that correct?

A. Yes.

Q. And you've had an opportunity to take a look at this document; is that right?

A. Somewhat.

Q. Okay. Let me -- this is spring 2006 AIMS

p. 191

performance comparisons. And I just want to point out a few things and get your comment.

If you take a look at grade four math, you'll see that reclassified -- at the reclassified ELL averages on the AIMS math test at fourth grade is 503.5. Do you see that?

A. I do.

Q. And then below that you see English only average for math grade four of 489.9. Do you see that?

A. Yes, I do.

Q. Now, it appears -- and if you take a look at all the various grade levels that are noted on this chart and you compare the reclassified ELL students to the regular English-speaking students at every grade level in math, in reading, in writing, can you tell us generally, how well are the reclassified ELL students in comparison with the regular English-speaking kids in the Nogales Unified School District?

A. They're very comparable. In some areas they seem to be doing better than our native English speakers.

Q. Indeed, if you go back to Exhibit 219, the schools in the Nogales Unified School District, they are all either performing, performing plus, or

p. 192

excellent schools in accordance with the report card; is that correct?

A. Yes.

Q. Irene, based on your observations and this performance data that has been recorded in the records of the Department of Education as well as information that has been provided to us by the Nogales Unified School District, based on all of these things, in your view did the Nogales Unified School District have sufficient resources to provide an excellent program for NUSD's ELL students so they could overcome language deficiencies?

A. Yes, very definitely.

Q. Based on the -- your observations at the Nogales Unified School District back in March and based on all the data that has been collected, did Nogales's ELL students have an appropriate program so that they had an opportunity to fully participate in Nogales's academic programs?

A. Yes, they did.

Q. Did you observe, other than the Wade Carpenter thing, any lack of material, textbooks, teacher shortages, inappropriate ratios at the Nogales Unified School District?

A. I did not observe that.

* * *

Appendix I

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MIRIAM FLORES, et al., Plaintiffs, vs. STATE OF ARIZONA; et al., Defendants.	Docket No. CV92-596 TUC-RCC Tucson, Arizona January 11, 2007 10:00 a.m.

[MORENO, T-3, 60:13-62:12]

Excerpt from Testimony of Irene Moreno

* * *

p. 60

. . .

Q. So it's not unusual to see test results at elementary and then compared to middle and then high school go down --

A. No.

Q. -- in rankings like this?

A. Right.

Q. Right?

A. But it's all students, not just second language learners.

Q. Nevertheless, the numbers at Nogales High School are not very good. Would you agree?

A. I would agree.

Q. Those are not acceptable numbers as far as

p. 61

you're concerned?

A. No, they aren't.

Q. And you talked about some of the things you observed at the high school the other day; correct?

A. That is correct.

Q. I think you mentioned that you had visited, what was it, right before a break or something like that? Was it spring break?

A. I think that's what they explained. March, I would assume is spring break.

Q. Okay. Now, what about on that same page where we've got Nogales High School, which ranked 5, you got Wade Carpenter Middle School, which ranked 409.

A. Yes.

Q. And I assume that's not an acceptable result to you, either?

A. No, it isn't.

Q. And what did you observe there that you think may contribute or account for that low ranking?

A. All we were -- all I observed were single classroom sets of their content books. I didn't see them having anything for students to use for homework or things of that nature.

Q. You didn't observe students playing bingo or

p. 62

anything like that?

A. Not there, no.

Q. And likewise at the alternative high school, which is the last one on the last page of that, which is ranked third from the bottom. I assume -- I mean, these are difficult students; correct?

A. Yes.

Q. They're not dumb students, though; right?

A. I don't think, no.

Q. This isn't an acceptable result even for difficult students, is it?

A. No, it isn't.

* * *

[MORENO, T-3, 93:21-94:11]

Excerpt from Testimony of Irene Moreno

* * *

p. 93

. . .

Q. Okay. And then the next chart on that page shows the four-year graduation rate for Arizona students; correct?

A. Yes, it does.

Q. Okay. For all students the graduation rate

p. 94

for 2004 was 77 percent and for 2005 was 75 percent; correct?

A. Yes.

Q. Okay. Now, would you go down to limited English-proficient. What about the graduation rate for limited English-proficient?

A. It's 59 percent in '05. Doesn't show anything in '04.

Q. Now, is that an acceptable graduation rate from your standpoint?

A. No.

* * *

Appendix I

[MORENO, T-3, 167-169]

Excerpt from Testimony of Irene Moreno

* * *

p. 167

. . .

Q. Now, at least I see a little bit of a trend in this document. If you look at the middle schools, the two middle schools, and you look at the high schools, their percentages of passing all three seems to drop down from the elementary schools. You see that same trend?

A. I do.

Q. Let's talk for a moment about what kind of children or students would be ELL in the later grades the high school grades or the middle school grades.

Now, it's possible, at least theoretically, that you could have had a child that started in the first grade in Nogales and by the 8th grade still has not learned English. That wouldn't be good, but I guess theoretically it's possible.

p. 168

A. It's possible, but it wouldn't be a language issue neccssarily. If a student is being taught in English and the environment that they're in is in English, even if it's in another language at home, there's other issues. It's not a language issue. So I just --

Q. Okay. No, fair enough. I'm glad for that clarification. What you often have in the higher grades if you have ELL students, you've got students that are new to that district; is that a fair statement?

A. That could be, yes.

Q. So in this case these could have been children who had not been in the Nogales Unified system for very long?

A. That's possible, yes.

Q. Some of them could be recent immigrants; is that a fair statement?

A. Yes, it is.

Q. And I believe Dr. Porter had told us that the younger children seemed to learn English more easily but not necessarily as efficiently as the older children. Is that consistent with your experience?

A. Yes, it has been.

Q. So once we get to those higher grades in the

p. 169

9th, 10th, 11th, 12th grade it becomes a little tougher to teach these children English; is that a fair statement?

A. Tougher in the sense they're a little more apprehensive, they're a little more embarrassed. You know, that apprehension in there. In that sense, yes.

Q. First grader is not going to be as scared to make a mistake on answering a question or something like that as maybe an older child?

A. That's correct.

Q. And you don't have all that peer pressure that you might have, teasing and so on?

A. That's right.

Q. Now, can we deduce from this chart whether Nogales Unified is doing a good job in teaching ELL students, doing a bad job in teaching ELL students, or can't really draw a conclusion from just this sheet?

A. You're right. I mean, we'd need a little more data than just what's here.

* * *

Appendix I

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MIRIAM FLORES, et al., Plaintiffs, vs. STATE OF ARIZONA; et al., Defendants.	Docket No. CV92-596 TUC-RCC Tucson, Arizona January 9, 2007 9:58 a.m.

[PORTER, T-1, 113-116:4]

Excerpt from Testimony of Rosalie C. Porter

* * *

p. 113

. . .

Q. And you were also provided with a copy of Exhibit 221, which is a newsletter written at the -- which is -- I'm sorry, which is a newsletter for the Nogales Unified School District that was issued the fall of 2006?

A. Yes, correct.

Q. Now, based on your review of these various documents, do you have an opinion regarding the success of the English language learner programs in the Nogales Unified School District?

A. I have a very high opinion of the Nogales Unified School District for the job it is doing for its ELL students and other students, but I'm principally interested in the performance of the ELL students, of

course. The high level of performance on AIMS tests, SAT-9 tests, the progress from year to year where improvement is shown, the high level of performance and the high percentage of students tested is better than what I have seen in many places in California, in Massachusetts, and other places. This is just a fine performance.

Q. How does this success -- well, I'll just go

p. 114

ahead and ask you, how does this success compare with what you've seen in other areas of the country?

A. Excuse me?

Q. How does this success in Nogales compare with what you have seen in other areas of the country?

A. Well, I think from my observation, Arizona has taken up this charge since the change of the law in the 2000 vote changing the law from bilingual to structured English immersion. The state has taken this obligation very seriously in the sense of what I heard this morning, but also what I have been reading in all the documents, the responsibility of seeing that better teacher training is done, that testing related to the proficiencies is done, because unless you have an objective measure it doesn't matter what kinds of things you say you are putting into a program.

I'm afraid this is what we did for the first 20 years or so of public -- of bilingual education. We said are you teaching X number of hours in the native language, do you have certified teachers, how much are you spending, are you teaching the cultural

background of the children? We talked about all the things that we were supposed to be putting in. We did not talk about what results, what was the outcome of

p. 115

all these efforts.

Arizona is looking at outcome, is looking at objective measures of student performance, and this is good. It's the only way you can say if certain schools or districts have students not doing well, there's where we need to concentrate more effort. California has come to the same. They designed a whole system for the whole state of standards that students have to meet at every grade level, tests on those standards, and then the schools that are underperforming are given more funding, but they're also monitored more closely.

And so I believe what I am seeing in Arizona is really first-rate efforts by the state to improve education, and the results are beginning to show.

Q. Just a few more questions. Does an increase in funding provide success for ELL students?

A. Not by itself. It's always good to have more money and maybe it will be wisely spent, but it is only one indicator, and unless it is tied to other things, it is not -- I would quote -- I would just cite Eric Hanushek, a professor at Stanford University, perhaps the best-known authority in this country, an economist, who has done the greatest research on whether -- on school funding, and he has

p. 116

concluded in several of his research studies that simply putting in more money does not necessarily

equal success. And I would cite him. Again, this is not my specialty, but I would say that.

* * *

[PORTER, T-1, 128:24-129:5]

Excerpt from Testimony of Rosalie C. Porter

* * *

p. 128

. . .

We've heard your testimony that 25, somewhere in the 20s is an appropriate number. Do you have an

p. 129

opinion about whether if you take that number down to 15 or 10 it can help speed up the rate of acquisition of English by English language learners?

A. I think if you take it down to 15 or 10, you really could speed up the rate of English learning.

* * *

[PORTER, T-1, 148-151:4]

Excerpt from Testimony of Rosalie C. Porter

* * *

p. 148

. . .

Q. Now, just because one school district spends $3,000 or $5,000 on a per-student basis for ELL programs, does that guarantee that you're going to have a successful outcome?

A. That alone is not the key. Money alone is not the key. The wise spending of it.

Q. And you found that in the Nogales Unified School District, which was spending $369 per incremental cost per the study, that they were providing a good ELL program; correct?

A. In our judgment, yes.

Q. Now, you mentioned -- you were asked some questions about goals, and even though I'm not sure that Mr. Hogan identified House Bill 2064, you were asked some questions about two-year requirements of the statute, and hopefully I'm not going to misinterpret the statute, but the statute has two components in terms of funding. One component says that English language learner students shall receive funding for a period of two years, at which time they are expected to exit the program, and if they don't exit the program within those two years, certain items of funding get eliminated, and that for those students who continue on after that two years who are still ELL

p. 149

students there is another item of funding that is provided for those students?

A. Yes. That's my understanding.

Q. My question to you is do goals in your view, in your professional opinion, do goals such as that make sense, and, if so, why?

A. They do. Let me say that in reviewing the policies in all of the large immigrant-receiving countries we found most -- all the other countries give one year of special help and they think it's sufficient. No other country in the developed world has ever conducted a bilingual program of the kind

that we put forth in this country. It's not done anywhere else.

So when we were talking about putting a citizen's ballot on the referendum in California we wanted to put a goal amount of time on it, and looking at the rest of the world it seemed if we say the goal is one year, all the students will not have mastered English that well at the end of the year, but we will also put in the law that those students who need more help, a second or third year, it will be provided for them.

That was the essence of the California referendum law, the Massachusetts law. I'm not

p. 150

familiar with the Arizona law. I assume it was about the same.

Having a goal time is important because it gives people something to work toward. We are going to try to teach English as well as we can. At the end of one year, at the end of two years we'll assess the students and maybe most of them will be doing very well, and if they continue to need a little help with reading and writing, we'll give it to them. That's my view.

Q. Now, in Arizona, and I don't know if you do know this, there is such a thing called group B weights whereby stipends are provided for certain categories of students, including ELL students.

A. Yes.

Q. Now, if you don't have these goals of two years, do you know whether there is any kind of financial incentive to keep students in ELL programs?

A. Well, I know that in every other state of the 16 states that have bilingual education laws or English language laws that there are -- there are higher levels of funding for ELL children compared to children who already know English, and that those higher levels are provided for a certain number of years or until students reach a certain proficiency.

p. 151

Unfortunately in some places these have been abused and students have kept -- been kept in year after year to get the extra money from the state. That's not the way it should be, of course, but it happens.

* * *

Appendix I

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MIRIAM FLORES, et al., Plaintiffs, vs. STATE OF ARIZONA; et al., Defendants.	Docket No. CV92-596 TUC-RCC Tucson, Arizona January 24, 2007 9:59 a.m.

[SOTO, T-7, 25:3-32:2]

Excerpt from Testimony of Karla G. Soto

* * *

p. 25

. . .

Q. And if you go up, if you go across, you've got total ELL costs of 3.88 million dollars; correct?

A. Yes.

Q. And then you've got a per pupil amount for ELL students of $1570?

A. That's correct.

Q. And change. And then in the columns for funding sources, for example, in the M&O column, right next to it -- you see that?

A. Yes.

Q. -- it shows a grand total of 12.745 million dollars; right?

A. Yes.

Q. Now, that's not the amount that's being spent on English language learners?

A. No. This was just the total of the numbers that we used to come up with identifying areas in which there were ELL costs. However, in order for you to determine what the true M&O ELL costs are, you would have to go through each M&O line item and apply the percentage in that specific category to come up with that, and, in preparation for this, because I know that it came up during my deposition where there

p. 26

was some confusion about the number, I went back and added and actually wrote in the number that I came up with as true ELL costs within M&O, and that number is 2,039,000.

Q. 2,039,000?

A. Right. At $205. Yeah. The per pupil would be $824.25.

Q. Well, just -- let me make sure I've got this right. Out of M&O --

A. Right.

Q. -- the amount the district spends out of its M&O funds on -- for ELL programs incremental costs --

A. Right.

Q. -- for its ELL programs is how much?

A. $2,039,205.

Q. And how much does that calculate out to on a per English language learner student basis?

A. It's $824.25.

Q. Okay. I misunderstood the first time. $824?

A. Yes.

Q. So a little more than half of the total of 1570 is actually coming out of the district's M&O funds?

A. Right. And override funds are also part of the M&O budget, so that should be added in that

p. 27

figure. If you want to identify true M&O costs, then you would have to add the override figure into it as well, and my total for override was $107,429, and the pupil cost was $43.43. So total maintenance and operation would be about $867 per student.

Q. And remind us, what's the group B weight that the state provides for ELL students?

A. It's $364 and change, about $365.

Q. So you're spending -- Nogales is spending an additional 500-some dollars out of its M&O to support its ELL programs?

A. And that's what we found out through conducting the cost study is we were spending more on the per pupil basis.

Q. Now, so the balance between -- the difference between the $1570 total for each ELL student and the $867 that you've identified coming out of M&O and the override is attributable to all these other funds; right?

A. Yes.

Q. Classroom site fund, on and on, through the federal funds; right?

A. Right. And I didn't go through the same exercise in calculating all of them. I did look at Title I and see what we were spending in Title I,

p. 28

Title II and Title III.

Q. Do you have those figures?

A. Yes. Under Title I school improvement, the total for that column is 56,300, and all of those costs are ELL costs, and the per pupil amount is $22.76.

Q. 22.76?

A. Yes. That's Title I school improvement.

Q. And then Title II?

A. Well, there's two columns for Title I. The first one is identified as school improvement. The next one is Title I, and the total costs that I added for Title I was $857,735, and the per pupil amount is $346.70.

Q. And then Title II?

A. Title II the total was $14,045 and per pupil was $5.68.

Q. Title III?

A. Title III total was $266,775 and the per pupil amount was $107.83.

Q. And while we're there, what's that last column?

A. The last column is Title V innovative programs, and the total there was $2,675 and the per pupil amount $1.08.

p. 29

Q. Now, looking at Exhibit 7, putting aside the additional needs that you've got down there after these totals, but looking at Exhibit 7, is it your opinion that the costs identified there for English language learners would be saved in Nogales or go away if the district had no -- if all of the district's ELL students were fluent English-proficient and had never been classified as ELLs?

A. Are you asking the question just the additional needs?

Q. Yes. No, no, I'm sorry, not just -- I'm looking at the total, $1570, does all that money go away if Nogales doesn't have any English language learners?

A. I would think that for the most part they would. There would be some areas that we would probably have to go back and revisit, but because we haven't been in that scenario, I don't think that we have thought about, you know, making another cost analysis whether those programs should continue or not.

Q. Okay. Are there any that come to mind that you'd want to revisit to determine whether or not those costs would continue even if the ELL students were fluent English-proficient instead?

p. 30

A. I would think that lines 37 and 38, we would need to go back and revisit those.

Q. Gallileo and Turnleaf programs?

A. Right. I would think because it does address the entire population of the district, although they were put into place because of the needs that we had at the district and the need to identify the data and the need to know how students were performing on a quarterly basis, for example, I believe that those programs were put into place because of the high level of need, but I would think that they would be necessary to continue to a certain extent within the district. I don't know what the costs would be. I'm not sure how the costs are set up, if it's on a per-pupil basis or if it's on different modules, for example, that provide different tracking in different areas. I'm not exactly sure. We'd have to go back and look at that again.

Q. So those programs were put in place because of the high need that Nogales had; correct?

A. Right. And we wanted to use our own data to know how we were doing within the district in comparison to prior years, and what I've seen in different presentations at the district is that sometimes we can't compare apples to apples per se

p. 31

because the data or the formatting of the reporting of the data has changed throughout the years, not only at the district level but at the state level, for example, that we wanted to have an internal assessment system in place so that we could keep track of our own information and be able to compare comparable information.

Q. But otherwise, with the exception of lines 37 and 38 which you would want to reevaluate, you're satisfied that these other costs are the costs associated with educating English language learners that are over and above the costs for educating fluent English-proficient students?

A. I would think that those would be the two major items. Transportation would be another one that we would have to go back, I mean, if the ELL went away.

Q. Which line are you looking at?

A. Like 46, for example, transportation. We'd still have summer school programs, for example, which we would have to transport students. The question would be would we be transporting the same amount of students or less students. If it's less students, the cost would be less because we'd be

running fewer buses, for example. So we'd have to go back and make

p. 32

another cost analysis in that specific program to see what the costs or the projected costs would be.

* * *

[SOTO, T-7, 54:13-55:14]

Excerpt from Testimony of Karla G. Soto

* * *

p. 54

. . .

Q. Finally, you're aware that in the legislation passed last year in House Bill 2064 there's a new requirement that is part of the models that get adopted by the task force that it include -- each model include four hours of English language development for first-year English language learners?

A. Yes.

Q. You're familiar with that?

A. Yes.

Q. Do you have an opinion about whether that's going to affect the incremental costs of providing ELL instruction in Nogales?

A. Well, I would think that would change the

p. 55

setting of the current classroom in Nogales where we would probably have to have extensive pullout programs because of the large ELL population that we have. We'd have to take into account whether we'd have the facilities, the staff,

the curriculum, so there would be different areas that we'd have to identify as areas of need and then come up with some cost associated with each.

So my first thought would be, yes, there would be additional costs. I can't tell you to what extent those would be.

Q. You haven't attempted to calculate those at this point?

A. No.

* * *

Appendix I

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MIRIAM FLORES, et al., Plaintiffs, vs. STATE OF ARIZONA; et al., Defendants.	Docket No. CV92-596 TUC-RCC Tucson, Arizona January 12, 2007 10:15 a.m.

[VALDIVIA, T-4, 141-145]

Excerpt from Testimony of Richard J. Valdivia

* * *

p. 141

Q. And Title III is specifically for --

A. It's for the education of English language learners, providing services.

Q. Okay. Now, let's drop down in your chart on the same page and let's look at the override.

A. Okay.

Q. We heard from Superintendent Cooper that at least in his tenure two overrides were adopted, one before he got there but it was still in effect and then another just before he left?

A. That's correct.

Q. What does this chart tell us?

A. Well, it just tells you Nogales went to their voters and passed an override beginning in 2001 and

through 2007, and accordingly raised additional funds from their taxpayers.

Q. Okay.

A. This is outside of their regular equalization amount.

Q. What are the limitations, sir, on how this money can be spent?

A. I believe this money can be spent for anything that's related to maintenance and operations. Again, this isn't something, you know, but I believe that it can be -- it basically goes into

p. 142

the equal -- you know, the amounts that they use for maintenance and operations. That's my understanding.

Q. It goes into the M&O fund?

A. That's correct.

Q. An item that M&O money can be spent on is ELL?

A. Correct.

Q. Now, to the extent that Judge Marquez had found that Nogales was unlikely to adopt an override, we now know that that finding was just error?

A. They did adopt an override.

Q. Twice?

A. That's correct.

Q. Okay. Let's turn to the next page, and that gives us the M&O in Nogales?

A. Correct.

Q. Based in 2000 and you carry it on up each year to 2007?

A. That is correct.

Q. Okay. The second column is the gross dollars?

A. Well, the second column -- well, okay, yes, that's the years, that's the gross dollars, that's correct.

Q. The third column is the number of kids

p. 143

counted in Nogales?

A. That's correct.

Q. And then the fourth column, of course, is the dollars?

A. Correct.

Q. Now, Mr. Valdivia, it seems to me as though we've increased $1,262?

A. That's basically what I did in the following paragraph, I just looked at how they had increased from 2000 to 2007.

Q. And your paragraph indicates that that's an increase of about 34 percent?

A. That's correct.

Q. Is that including the override money?

A. No, it would not. I believe that's exclusive of the override money.

Q. Then let's -- this is just money the State has given or the legislature has appropriated and we're looking at Nogales's share?

A. Correct.

Q. Year by year?

A. Correct.

Q. Let's drop down to the classroom site funds. Now, this, again, is Proposition 301 that we're talking about?

p. 144

A. Correct.

Q. And we can see that in 2002 -- now, proposition -- I think Proposition 302 was adopted by the voters in 2000?

A. Correct.

Q. But it didn't kick in, it took a while to kick in?

A. That's correct.

Q. Is that why you begin with 2000?

A. That is the first year the funds were made available.

Q. Now, when you say fiscal year 2000, you're actually looking at --

A. 2002. When we say "fiscal year," when we talk about state fiscal year, we're talking about the year that it ends. So these -- when we say fiscal year 2002 we mean June 30, 2002.

Q. So approved by the voters in November of 2002, begins to kick in 2001, fiscal year ending June 30, 2002, is the first year that we have good figures?

A. Correct.

Q. Now, Mr. Valdivia, we have 1,900,000 approximately in the first year?

A. Correct.

p. 145

Q. And it goes up then to $2,337,050 in the current fiscal year?

A. Correct.

Q. Which is an increase of about $436,000 in 2007 over 2002?

A. Correct.

Q. But that 2002, that million nine, is a total increase over what had been coming in 2000?

A. Those funds were not available prior to that time.

Q. Now, we were talking about -- remember I was asking you about the casino gaming?

A. Correct.

Q. And how that money would go into the instructional improvement fund?

A. Correct.

Q. Now, we go down to the next paragraph -- drop down, scroll down a little bit, Andy. The next paragraph right below the chart.

Okay, here you tell us how much came into the instructional improvement -- or I should rephrase that. Here you tell us how much came to Nogales from the instructional improvement fund in 2006?

A. Correct.

* * *

Appendix I

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MIRIAM FLORES, et al., Plaintiffs, vs. STATE OF ARIZONA; et al., Defendants.	Docket No. CV92-596 TUC-RCC Tucson, Arizona January 18, 2007 9:52 a.m.

[ZAMUDIO, T-6, 24:15-27:8]

Excerpt from Testimony of Guillermo V. Zamudio

* * *

p. 24

. . .

Q. Okay. And you've mentioned class size a couple of times. Does the district have class size policies or goals in place?

A. Yes, we do.

Q. Can you tell us what those are?

A. The goals -- we actually have adopted some more rigorous class size goals this year as part of trying to make an emphasis on lowering our class sizes. Twenty-five was the elementary level prior to this year and at the high school, and I believe it was 22 at the elementary, and we have changed our policies

p. 25

to reduce -- at Pearson Vocational we reduced it to 20. Because of the setting that the students were in there, we believe that we need smaller class sizes. So they range from 22 to 25.

Q. Okay. Let's go through this again because I'm not sure I heard it correctly.

A. Certainly.

Q. At the elementary school level what's the class size goal?

A. Twenty-two.

Q. At middle school?

A. At middle it would be -- I believe it's 25.

It mate be 22. I'd have to look at our --

Q. Okay. And at the high school level it's what?

A. Twenty-five.

Q. Twenty-five. Except for --

A. Except for Pearson which is 20, this year. Last year it was 25 also.

Q. Now, do those numbers represent -- is that what you're saying, is that those class size goals represent a more vigorous application or a reduction in class size from previous goals?

A. Yes, that's correct. And from last year.

In looking at what is happening with the open

p.26

enrollment and looking at the numbers, in addition we're also trying to look at what's going to happen in the future because we're having developments taking place to where our in-district students are going to grow based on the housing developments that are going in, so we're trying to manage it, as I said before. It's looking at all the variables, so we're trying to make sure that we keep

a goal, that we have a target so that when we do have the numbers that increase that we can take a look at where we can make changes.

Q. At some point with growth and with reduced class sizes you have to construct additional classrooms; right?

A. That's correct. If you continue to grow, you have to construct additional classes. At the current time we don't have a need. We do anticipate that that may happen in the future.

Q. Now, as far as class size goes, do you know what those goals that you just told us about are based on?

A. No, no, I don't know. I believe that they were based on prior. I know that I have tried to reduce the goals that we had last year, based on the fact that in my experience I've been in the classroom

p. 27

years and so I know that smaller class sizes do make a difference. I know that ideally it would be nice to have the 15 because I think that's a number that research indicates where it makes a difference.

And so but we also have to look at logistically and financially what's feasible. So I think it's more of a compromise in terms of the best class size that we can get at this point.

* * *

[ZAMUDIO, T-6, 73:13-80:20]

Excerpt from Testimony of Guillermo V. Zamudio

* * *

p. 73

. . .

Q. Okay. Now, is it your understanding based on this cost analysis that if you didn't have any English language learners in the Nogales district and they'd never been classified as English language learners, they've all been English-proficient since day one, came into the district English-proficient, that this $1,570 per student extra that Nogales has, is it your understanding that those costs would go away for Nogales?

A. Yes. Because they would -- I say yes and no, and let me explain my answer. Yes, for the most part. There are some things in here that would not be -- would go away, for

p. 74

example, the Gallileo assessment that I said. It's an academic performance instrument that we use, so that cost would still be necessary for students that were non-ELLs because we're tracking academic performance.

Q. So that's a cost you would have regardless of the fact that --

A. That is a cost that would be regardless of whether we had ELL students, but for the most part they would disappear.

Q. For example, we talked about teachers, number of teachers. Theoretically, if you didn't have any ELL students and kids who had never been ELLs, you'd be able to reduce the number of teachers you'd have; correct?

A. Yes, because we hire teachers for that particular purpose.

Q. To maintain a certain class size?

A. To maintain class size, right.

Q. You could actually have larger classes if you didn't have so many English language learners in your classroom?

A. Theoretically, that would be correct.

Q. That's not necessarily what the district would do, but that's a possibility?

A. It would be a management decision based on

p.75

looking at your costs and trying to make the best use of your dollars and being financially prudent. That would be an alternative that would be weighed and looked at. You can increase the size of your class sizes and then in essence reduce the number of teachers that you have.

Q. There are any number of things you can do with the costs you would save?

A. Certainly.

Q. Now, go to the second page of that cost analysis for a moment. At the bottom there is a section entitled "Additional Needs" beginning at line 54.

A. Yes.

Q. By the way, before we get to that, the rest of this chart on the cost analysis indicates the source of funds for various cost categories; right?

A. That is correct.

Q. We've got M&O, we've got override, classroom site fund, on and on?

A. That's correct.

Q. You don't have anything to do with identifying the source of funds for -- that are shown on that cost sheet?

A. No, that's correct, I did not.

p. 76

Q. Ms. Soto did that?

A. That is correct. Ms. Soto does a very good job of tracking our cost and our revenues.

Q. Okay. Now, let's go back to this additional needs. Can you explain that for us?

A. Additional needs were what we listed that are above and beyond what we currently have, actual costs that would help us to further enhance our ability to help English language learners so that we can meet the goal, and so we've listed some there.

At the time we developed it there's some other costs that -- one of the things in going through the exercise that we realized are that cost studies may have to be done every year because there are some programs that we have not taken into account, for example, the AVID program that we implemented this year.

Q. Which program?

A. AVID. It's the --

Q. A-V-I-D?

A. A-V-I-D. It stands for advancement via individual determination. And we've implemented this year and it's a program that requires extra time with students, and it's a very good program that's been around for over 20 years, and the program is

p. 77

increment -- well, incremental is the word. Over time it's going to cost us more to continue to maintain the AVID program. But it's a program that's targeted specifically for helping average

students move forward in terms of their academic performance, to help meet the state standards.

So we've listed the programs at the time under these categories here.

Q. Okay. So, well, I'm just trying to figure out, is this a wish list for the district or do you believe that these are essential to the future success of your programs for ELL students?

A. We believe it's essential. We've indicated additional tutoring, we've indicated additional base pay for teachers because we felt that it's important that the teachers at least be paid average so we can attract highly qualified teachers to our district, we've indicated additional instructional aides, which would be the paraprofessionals at the elementary. The No. 12 represents one more per grade level so we have one in 2nd grade and in 3rd grade. We've indicated additional section of the instruction and that says 10, that represents the two middle schools and the two high schools. Again, paraprofessionals. We have indicated items that we believe are essential and

p. 78

necessary for us to be able to have our students learn English.

Q. Now, I assume you would say, but I'll ask you, I mean, is that true of all the other costs shown above your additional needs that resulted in the $1570?

A. There was two types in here that we listed, so not necessarily. One type was because we know we're going to lose the funding this year, like Reading First is going away, or there may be some other funding that Ms. Soto could tell you we know is not going to

be here next year, so we listed it as an additional cost to be able to support that.

So you could technically say that one is because of a reduction in funding, the others are additional funds that don't exist currently.

Q. I guess what I'm trying to get at is do you believe you're providing adequate programs and that all the costs shown in Exhibit 7 are essential to providing those programs?

A. Yes.

Q. Do you believe you have a gold-plated program?

A. No.

Q. How would you characterize it, if not

p. 79

gold-plated or excessive or extravagant or anything like that?

A. Well, based on the fact that we have costs that we're incurring and based that we have additional costs, I would say that if we're talking gold, silver and bronze, I'd classify that as a bronze-plated program.

Q. Now, these costs, these additional needs that you've just discussed for us, those don't include smaller class sizes, do they?

A. I don't believe that we had additional teachers, but I'd have to look at it to make sure. They don't.

Q. Well, what I'm trying to get at is, we talked earlier in your testimony about how the class size goals for the district are based on practical considerations? I mean, you don't have unlimited

funding to develop and implement your ELL programs; correct?

A. That's correct.

Q. You talked about research indicating that 15 was an appropriate class size and could be effective and improve the rate of English acquisition for students?

A. Yes. I believe it's important, especially

p. 80

for the first level of English learners, that you do reduce the class size. And I believe that the literature indicates that anything under 15 is effective.

Q. But that's not included here?

A. No.

Q. Why not?

A. I guess we were just not totally thinking in terms of comprehensiveness in terms of the total program. We developed this at a time trying to reflect what the costs are. We didn't have a wish list, we were trying to be reasonable. We were trying to reflect something that actually we believed is our best estimate.

Q. Something that's achievable over the reasonably near future?

A. Absolutely.

Q. Whereas reducing your class sizes to 15 might not fall into that category?

A. Correct.

* * *

[ZAMUDIO, T-6, 83-84]

Appendix I

Excerpt from Testimony of Guillermo V. Zamudio

* * *

p. 83

. . .

A. That is correct. In education.

I commend you, sir, because you've really accomplished a lot for someone who has come in and didn't have English proficiency, but you overcame it.

What I'd like to talk to you about is, to begin with, we've had a discussion of gold-plated and silver-plated and bronze-plated. To get away from jewelry, do you have an effective or an ineffective program for your ELL students?

A. I guess I would answer that question based on to what degree you define "effectiveness." I believe that we have a more effective program that still needs to be enhanced.

Q. If I understood Mr. Cooper's testimony, his goal was to have an improvement program every year. Do you remember hearing that testimony, sir?

A. I remember that, the testimony about the goals that were established.

Q. Is that your philosophy also, Dr. Zamudio, to have an improvement every year?

A. Absolutely.

Q. So you're never satisfied with last year's results, I take it? Always trying to do a little bit better the next year?

A. Never satisfied in some areas. It depends

p. 84

on -- once you've attained your goals, you may have to do a reanalysis, but I believe at some point

you would have satisfaction, you're satisfied with progress that you make.

Q. Fair enough. With your current ELL program you are -- it is an effective program, but it can become better? Have I said that right?

A. Yes, sir.

Q. I would like to talk to you for a moment, sir, about -- if you could get in front of you, please, Exhibit 7 from Mr. Hogan's book, and I'm --

Give me a moment. I have to get the other book. We have two books of exhibits.

If you could also pull together in front of you, sir, Exhibit, I believe it's 236.

Starting with Exhibit 7, Dr. Zamudio, if you go to line -- bear with me for a minute --

A. Can I ask you a question?

Q. Yes, sir.

A. Government's Exhibit 236, there's two pages. One is not marked, one is, it's the same?

THE COURT: It's a one-page exhibit, I think.

MR. CANTELME: May I approach, Your Honor, just to make sure we're on the same page?

THE COURT: Yes.

* * *

Appendix J

[EXHIBIT 7]

NOGALES UNIFIED SCHOOL DISTRICT #1
2005 - 2006 ELL COSTS

PROGRAM COMPONENT DESCRIPTION:	
Tutoring (After School) - Stipends for Teachers	
TOTAL COST:	$169,070.00
% ELL COSTS:	50.00%
TOTAL ELL COSTS:	$84,535.00
PER PUPIL AMOUNT (2474 ELL COUNT):	$34.17
M & O:	
Override:	$55,680.00
Classroom State Fund:	
***Comprehensive School Reform:	$21,170.00
**Early Childhood:	
*ELL Compensatory Ed:	
*ELL Instructional Materials:	
**Full Day Kinder:	
*Reading First:	$35,844.00
*Gear Up:	
Rural and Low Incomes:	$2,784.00
***Smaller Learning	$5,568.00

Appendix J

Communities:

Title I - School Improvement:

Title I:	$48,024.00
Title II:	
Title III:	
Title IV:	

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

Tutoring (After School) - Transportation Costs

TOTAL COST:	$17,211.75
% ELL COSTS:	50.00%
TOTAL ELL COSTS:	$8,605.88
PER PUPIL AMOUNT (2474 ELL COUNT):	$3.48
M & O:	
Override:	$17,211.75
Classroom State Fund:	

Appendix J

***Comprehensive School Reform:

**Early Childhood:

*ELL Compensatory Ed:

*ELL Instructional Materials:

**Full Day Kinder:

*Reading First:

*Gear Up:

Rural and Low Incomes:

***Smaller Learning Communities:

Title I - School Improvement:

Title I:

Title II:

Title III:

Title IV:

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

Appendix J

Tutoring (Extended Day) - Stipends for Teachers (NHS)

TOTAL COST:	$16,704.00
% ELL COSTS:	50.00%
TOTAL ELL COSTS:	$8,352.00
PER PUPIL AMOUNT (2474 ELL COUNT):	$3.38
M & O:	
Override:	
Classroom State Fund:	
***Comprehensive School Reform:	
**Early Childhood:	
*ELL Compensatory Ed:	
*ELL Instructional Materials:	
**Full Day Kinder:	
*Reading First:	
*Gear Up:	$16,704.00
Rural and Low Incomes:	
***Smaller Learning Communities:	
Title I - School Improvement:	
Title I:	
Title II:	
Title III:	

Appendix J

Title IV:

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

Tutoring for ELL students (After School) - Stipends for Teachers

TOTAL COST:	$21,576.00
% ELL COSTS:	100.00%
TOTAL ELL COSTS:	$21,576.00
PER PUPIL AMOUNT (2474 ELL COUNT):	$8.72

M & O:

Override:

Classroom State Fund:

***Comprehensive School Reform:

**Early Childhood:

*ELL Compensatory Ed:

*ELL Instructional Materials:

**Full Day Kinder:

Appendix J

*Reading First:

*Gear Up:

Rural and Low Incomes:

***Smaller Learning Communities:

Title I - School Improvement: $21,576.00

Title I:

Title II:

Title III:

Title IV:

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

SEI instruction for ELL students - Computers, Projectors & Smartboards for SEI instruction

TOTAL COST:	$84,557.91
% ELL COSTS:	100.00%
TOTAL ELL COSTS:	$84,557.91
PER PUPIL AMOUNT (2474	$34.18

ELL COUNT):	
M & O:	
Override:	
Classroom State Fund:	
***Comprehensive School Reform:	
**Early Childhood:	
*ELL Compensatory Ed:	
*ELL Instructional Materials:	
**Full Day Kinder:	
*Reading First:	
*Gear Up:	
Rural and Low Incomes:	
***Smaller Learning Communities:	
Title I - School Improvement:	
Title I:	$84,557.91
Title II:	
Title III:	
Title IV:	

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

SEI Instruction for ELL Students - Instructional Materials and Supplies (Site Allocations)

TOTAL COST:	$43,450.02
% ELL COSTS:	100.00%
TOTAL ELL COSTS:	$43,450.02
PER PUPIL AMOUNT (2474 ELL COUNT):	$17.56
M & O:	$1,622.88
Override:	
Classroom State Fund:	
***Comprehensive School Reform:	$1,834.30
**Early Childhood:	$5,625.65
*ELL Compensatory Ed:	
*ELL Instructional Materials:	
**Full Day Kinder:	

Appendix J

*Reading First:	
*Gear Up:	
Rural and Low Incomes:	
***Smaller Learning Communities:	
Title I - School Improvement:	
Title I:	$3,624.00
Title II:	
Title III:	$30,743.19
Title IV:	

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

SEI / ELL Tuition Reimbursement for Teachers /Paraprofessionals

TOTAL COST:	$8,099.60
% ELL COSTS:	100.00%
TOTAL ELL COSTS:	$8,099.60
PER PUPIL AMOUNT (2474	$3.27

Appendix J

ELL COUNT):	
M & O:	
Override:	
Classroom State Fund:	$4,051.60
***Comprehensive School Reform:	
**Early Childhood:	
*ELL Compensatory Ed:	
*ELL Instructional Materials:	
**Full Day Kinder:	
*Reading First:	
*Gear Up:	
Rural and Low Incomes:	
***Smaller Learning Communities:	
Title I - School Improvement:	
Title I:	$4,048.00
Title II:	
Title III:	
Title IV:	

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

SEI / ELL Training - Conference Registration Fees and Travel Costs

TOTAL COST:	$6,363.98
% ELL COSTS:	100.00%
TOTAL ELL COSTS:	$6,363.98
PER PUPIL AMOUNT (2474 ELL COUNT):	$2.57
M & O:	$59.50
Override:	
Classroom State Fund:	
***Comprehensive School Reform:	
**Early Childhood:	
*ELL Compensatory Ed:	
*ELL Instructional Materials:	
**Full Day Kinder:	
*Reading First:	$169.90

Appendix J

*Gear Up:	
Rural and Low Incomes:	
***Smaller Learning Communities:	
Title I - School Improvement:	$509.70
Title I:	$1295.92
Title II:	
Title III:	$4,328.96
Title IV:	

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

SEI / ELL Training - Stipends for Teachers/ Trainers

TOTAL COST:	$11,020.00
% ELL COSTS:	100.00%
TOTAL ELL COSTS:	$11,020.00
PER PUPIL AMOUNT (2474 ELL COUNT):	$4.45

M & O:	
Override:	
Classroom State Fund:	
***Comprehensive School Reform:	
**Early Childhood:	
*ELL Compensatory Ed:	
*ELL Instructional Materials:	
**Full Day Kinder:	
*Reading First:	
*Gear Up:	
Rural and Low Incomes:	$6,960.00
***Smaller Learning Communities:	
Title I - School Improvement:	
Title I:	$4,060.00
Title II:	
Title III:	
Title IV:	

Appendix J

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

SEI / ELL Training - Consultant to provide training for teachers

TOTAL COST:	$15,418.67
% ELL COSTS:	100.00%
TOTAL ELL COSTS:	$15,418.67
PER PUPIL AMOUNT (2474 ELL COUNT):	$6.23

M & O:

Override:

Classroom State Fund:

***Comprehensive School Reform:

**Early Childhood:

*ELL Compensatory Ed:

*ELL Instructional Materials:

**Full Day Kinder:

*Reading First:

Appendix J

*Gear Up:	
Rural and Low Incomes:	
***Smaller Learning Communities:	
Title I - School Improvement:	
Title I:	$15,418.67
Title II:	
Title III:	
Title IV:	

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

SEI / ELL Training - Substitutes for teachers attending training

TOTAL COST:	$833.04
% ELL COSTS:	100.00%
TOTAL ELL COSTS:	$833.04
PER PUPIL AMOUNT (2474 ELL COUNT):	$0.34

Appendix J

M & O:	
Override:	
Classroom State Fund:	
***Comprehensive School Reform:	
**Early Childhood:	
*ELL Compensatory Ed:	
*ELL Instructional Materials:	
**Full Day Kinder:	
*Reading First:	
*Gear Up:	
Rural and Low Incomes:	
***Smaller Learning Communities:	
Title I - School Improvement:	
Title I:	
Title II:	
Title III:	$833.04
Title IV:	

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

SEI / ELL Training - Supplies and Materials for teachers (Site Allocations)

TOTAL COST:	$1,984.00
% ELL COSTS:	100.00%
TOTAL ELL COSTS:	$1,984.00
PER PUPIL AMOUNT (2474 ELL COUNT):	$0.80

M & O:

Override:

Classroom State Fund:

***Comprehensive School Reform:

**Early Childhood:

*ELL Compensatory Ed:

*ELL Instructional Materials:

**Full Day Kinder:

*Reading First:

Appendix J

*Gear Up:

Rural and Low Incomes:

***Smaller Learning Communities:

Title I - School Improvement:

Title I:

Title II:

Title III: $1,984.00

Title IV:

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

Indirect Costs Title III

TOTAL COST:	$5,343.17
% ELL COSTS:	100.00%
TOTAL ELL COSTS:	$5,343.17
PER PUPIL AMOUNT (2474 ELL COUNT):	$2.16

M & O:

Appendix J

Override:

Classroom State Fund:

***Comprehensive School Reform:

**Early Childhood:

*ELL Compensatory Ed:

*ELL Instructional Materials:

**Full Day Kinder:

*Reading First:

*Gear Up:

Rural and Low Incomes:

***Smaller Learning Communities:

Title I - School Improvement:

Title I:

Title II:

Title III: $5,343.17

Title IV:

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

Appendix J

PROGRAM COMPONENT DESCRIPTION:

Mentoring program (district wide) - Consultant Fee & Stipend for Teacher Mentor Coordinator

TOTAL COST:	$28,883.69
% ELL COSTS:	40.65%
TOTAL ELL COSTS:	$11,741.22
PER PUPIL AMOUNT (2474 ELL COUNT):	$4.75
M & O:	
Override:	
Classroom State Fund:	
***Comprehensive School Reform:	
**Early Childhood:	
*ELL Compensatory Ed:	
*ELL Instructional Materials:	
**Full Day Kinder:	
*Reading First:	
*Gear Up:	
Rural and Low Incomes:	
***Smaller Learning Communities:	
Title I - School Improvement:	
Title I:	$17,400.00

Title II:	$11,483.69
Title III:	
Title IV:	

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

Parent Involvement Components/Site & District Allocations

TOTAL COST:	$69,651.51
% ELL COSTS:	30.00%
TOTAL ELL COSTS:	$20,895.45
PER PUPIL AMOUNT (2474 ELL COUNT):	$8.45
M & O:	
Override:	
Classroom State Fund:	
***Comprehensive School Reform:	
**Early Childhood:	
*ELL Compensatory Ed:	

Appendix J

*ELL Instructional Materials:

**Full Day Kinder:

*Reading First:

*Gear Up:

Rural and Low Incomes:

***Smaller Learning Communities:

Title I - School Improvement:

Title I: $69,651.51

Title II:

Title III:

Title IV:

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

Mileage reimbursement for language acquisition coordinator and compliance consultants to visit school sites

TOTAL COST: $477.48

% ELL COSTS:	100.00%
TOTAL ELL COSTS:	$477.48
PER PUPIL AMOUNT (2474 ELL COUNT):	$0.19
M & O:	
Override:	
Classroom State Fund:	
***Comprehensive School Reform:	
**Early Childhood:	
*ELL Compensatory Ed:	
*ELL Instructional Materials:	
**Full Day Kinder:	
*Reading First:	
*Gear Up:	
Rural and Low Incomes:	
***Smaller Learning Communities:	
Title I - School Improvement:	
Title I:	
Title II:	
Title III:	$477.48
Title IV:	

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

Reading 1st Program - Supplemental Instructional Materials

TOTAL COST:	$399,901.46
% ELL COSTS:	40.65%
TOTAL ELL COSTS:	$162,559.94
PER PUPIL AMOUNT (2474 ELL COUNT):	$65.71
M & O:	
Override:	
Classroom State Fund:	
***Comprehensive School Reform:	
**Early Childhood:	
*ELL Compensatory Ed:	
*ELL Instructional Materials:	
**Full Day Kinder:	
*Reading First:	$399,901.46

Appendix J

*Gear Up:

Rural and Low Incomes:

***Smaller Learning Communities:

Title I - School Improvement:

Title I:

Title II:

Title III:

Title IV:

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

Salaries - Parent Liaisons 7.0 FTE

TOTAL COST:	$165,837.72
% ELL COSTS:	30.00%
TOTAL ELL COSTS:	$49,751.32
PER PUPIL AMOUNT (2474 ELL COUNT):	$20.11

M & O:

Appendix J

Override:

Classroom State Fund:

***Comprehensive School Reform:

**Early Childhood:

*ELL Compensatory Ed:

*ELL Instructional Materials:

**Full Day Kinder:

*Reading First:

*Gear Up:

Rural and Low Incomes:

***Smaller Learning Communities:

Title I - School Improvement:

Title I: $165,837.72

Title II:

Title III:

Title IV:

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

Appendix J

PROGRAM COMPONENT DESCRIPTION:

Salaries - Computer Lab Specialists 9.0 FTE

TOTAL COST:	$169,307.30
% ELL COSTS:	30.00%
TOTAL ELL COSTS:	$50,792.19
PER PUPIL AMOUNT (2474 ELL COUNT):	$20.53
M & O:	
Override:	
Classroom State Fund:	
***Comprehensive School Reform:	
**Early Childhood:	
*ELL Compensatory Ed:	
*ELL Instructional Materials:	
**Full Day Kinder:	
*Reading First:	
*Gear Up:	
Rural and Low Incomes:	$4,405.36
***Smaller Learning Communities:	
Title I - School Improvement:	
Title I:	$164,901.94
Title II:	

Appendix J

Title III:

Title IV:

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

Salaries - Data & Assessment Director

TOTAL COST:	$55,932.99
% ELL COSTS:	40.65%
TOTAL ELL COSTS:	$22,736.76
PER PUPIL AMOUNT (2474 ELL COUNT):	$9.19

M & O:

Override:

Classroom State Fund:

***Comprehensive School Reform:

**Early Childhood:

*ELL Compensatory Ed:

*ELL Instructional Materials:

Appendix J

**Full Day Kinder:

*Reading First:

*Gear Up:

Rural and Low Incomes:

***Smaller Learning Communities:

Title I - School Improvement:

Title I: $55,932.99

Title II:

Title III:

Title IV:

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

Salaries - District Computer Technician

TOTAL COST: $49,491.49

% ELL COSTS: 40.65%

TOTAL ELL COSTS: $20,118.29

Appendix J

PER PUPIL AMOUNT (2474 ELL COUNT):	$8.13
M & O:	
Override:	
Classroom State Fund:	
***Comprehensive School Reform:	
**Early Childhood:	
*ELL Compensatory Ed:	
*ELL Instructional Materials:	
**Full Day Kinder:	
*Reading First:	
*Gear Up:	
Rural and Low Incomes:	
***Smaller Learning Communities:	
Title I - School Improvement:	
Title I:	$49,491.49
Title II:	
Title III:	
Title IV:	

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

Salaries - Teachers providing SEI instruction (K-12)

TOTAL COST:	$12,493,695.03
% ELL COSTS:	10.00%
TOTAL ELL COSTS:	$1,249,369.50
PER PUPIL AMOUNT (2474 ELL COUNT):	$505.00
M & O:	$11,229,598.43
Override:	$142,655.12
Classroom State Fund:	$454,991.88
***Comprehensive School Reform:	
**Early Childhood:	
*ELL Compensatory Ed:	
*ELL Instructional Materials:	
**Full Day Kinder:	$308,417.91
*Reading First:	

Appendix J

*Gear Up:	
Rural and Low Incomes:	$33,506.54
***Smaller Learning Communities:	
Title I - School Improvement:	
Title I:	$230,751.53
Title II:	$93,733.63
Title III:	
Title IV:	

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

Salaries - Instructional Aides (K-5)

TOTAL COST:	$755,520.93
% ELL COSTS:	30.00%
TOTAL ELL COSTS:	$226,656.28
PER PUPIL AMOUNT (2474 ELL COUNT):	$91.62

M & O:	$480,777.04
Override:	
Classroom State Fund:	
***Comprehensive School Reform:	
**Early Childhood:	$77,974.14
*ELL Compensatory Ed:	
*ELL Instructional Materials:	
**Full Day Kinder:	$74,477.22
*Reading First:	
*Gear Up:	
Rural and Low Incomes:	
***Smaller Learning Communities:	
Title I - School Improvement:	
Title I:	$122,292.54
Title II:	
Title III:	
Title IV:	

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

Salaries - Counselors (6-12) 9.0 FTE

TOTAL COST:	$525,848.41
% ELL COSTS:	50.00%
TOTAL ELL COSTS:	$262,924.21
PER PUPIL AMOUNT (2474 ELL COUNT):	$106.27
M & O:	$525,848.41
Override:	
Classroom State Fund:	
***Comprehensive School Reform:	
**Early Childhood:	
*ELL Compensatory Ed:	
*ELL Instructional Materials:	
**Full Day Kinder:	
*Reading First:	

Appendix J

*Gear Up:

Rural and Low Incomes:

***Smaller Learning Communities:

Title I - School Improvement:

Title I:

Title II:

Title III:

Title IV:

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

Salaries - Intervention Specialists (K-5) 6.0 FTE

TOTAL COST:	$223,704.15
% ELL COSTS:	50.00%
TOTAL ELL COSTS:	$111,852.08
PER PUPIL AMOUNT (2474 ELL COUNT):	$45.21

M & O:

Override:

Classroom State Fund:

***Comprehensive School Reform:

**Early Childhood:

*ELL Compensatory Ed:

*ELL Instructional Materials:

**Full Day Kinder:

*Reading First:

*Gear Up:

Rural and Low Incomes:

***Smaller Learning Communities:

Title I - School Improvement:

Title I: $223,704.15

Title II:

Title III:

Title IV:

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

Salaries - Literacy and Language Acquisition Department-1.0 FTE Director (incl contract extension for summer); 5.0 FTE Compliance Consultants/ELL Data Technicians + 13 SEI Site Specialists Stipends

TOTAL COST:	$165,366.42
% ELL COSTS:	100.00%
TOTAL ELL COSTS:	$165,366.42
PER PUPIL AMOUNT (2474 ELL COUNT):	$66.84
M & O:	
Override:	
Classroom State Fund:	
***Comprehensive School Reform:	
**Early Childhood:	
*ELL Compensatory Ed:	

Appendix J

*ELL Instructional Materials:

**Full Day Kinder:

*Reading First:

*Gear Up:

Rural and Low Incomes:

***Smaller Learning Communities:

Title I - School Improvement:

Title I: $42,627.68

Title II:

Title III: $122,738.74

Title IV:

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

Salaries - Reading 1st Program: Reading Interventionists, Reading Coaches, Assessment Coordinators

TOTAL COST: $414,191.32

Appendix J

% ELL COSTS:	30.00%
TOTAL ELL COSTS:	$124,257.40
PER PUPIL AMOUNT (2474 ELL COUNT):	$50.23
M & O:	
Override:	
Classroom State Fund:	
***Comprehensive School Reform:	
**Early Childhood:	
*ELL Compensatory Ed:	
*ELL Instructional Materials:	
**Full Day Kinder:	
*Reading First:	$414,191.32
*Gear Up:	
Rural and Low Incomes:	
***Smaller Learning Communities:	
Title I - School Improvement:	
Title I:	
Title II:	
Title III:	
Title IV:	

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

Salaries - Reading Specialists (K-12)

TOTAL COST:	$418,551.72
% ELL COSTS:	70.00%
TOTAL ELL COSTS:	$292,986.20
PER PUPIL AMOUNT (2474 ELL COUNT):	$118.43

M & O:

Override:

Classroom State Fund:

***Comprehensive School Reform:

**Early Childhood:

*ELL Compensatory Ed:

*ELL Instructional Materials:

**Full Day Kinder:

*Reading First:

Appendix J

*Gear Up:

Rural and Low Incomes:

***Smaller Learning Communities:

Title I - School Improvement:

Title I: $418,551.72

Title II:

Title III:

Title IV:

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

Salaries - Teachers teaching ELL classes (1 @ SCAHS, 3 @ NHS, 13 sections @ DSMS, 9 sections @ WCMS)

TOTAL COST:	$303,315.72
% ELL COSTS:	100.00%
TOTAL ELL COSTS:	$303,315.72
PER PUPIL AMOUNT (2474	$122.60

Appendix J

ELL COUNT):	
M & O:	$270,261.19
Override:	
Classroom State Fund:	
***Comprehensive School Reform:	
**Early Childhood:	
*ELL Compensatory Ed:	
*ELL Instructional Materials:	
**Full Day Kinder:	
*Reading First:	
*Gear Up:	
Rural and Low Incomes:	
***Smaller Learning Communities:	
Title I - School Improvement:	$33,054.53
Title I:	
Title II:	
Title III:	
Title IV:	

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

Stipends for Certified Staff - ELL Facilitator

TOTAL COST:	$5,568.00
% ELL COSTS:	100.00%
TOTAL ELL COSTS:	$5,568.00
PER PUPIL AMOUNT (2474 ELL COUNT):	$2.25
M & O:	
Override:	
Classroom State Fund:	
***Comprehensive School Reform:	$5,568.00
**Early Childhood:	
*ELL Compensatory Ed:	
*ELL Instructional Materials:	
**Full Day Kinder:	
*Reading First:	

Appendix J

*Gear Up:

Rural and Low Incomes:

***Smaller Learning Communities:

Title I - School Improvement:

Title I:

Title II:

Title III:

Title IV:

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

Stipends for Certified Staff - ELL Intervention Coordinators

TOTAL COST:	$2,320.00
% ELL COSTS:	100.00%
TOTAL ELL COSTS:	$2,320.00
PER PUPIL AMOUNT (2474 ELL COUNT):	$0.94

Appendix J

M & O:

Override:

Classroom State Fund:

***Comprehensive School Reform:

**Early Childhood:

*ELL Compensatory Ed:

*ELL Instructional Materials:

**Full Day Kinder:

*Reading First:

*Gear Up:

Rural and Low Incomes:

***Smaller Learning Communities:

Title I - School Improvement:

Title I: $2,320.00

Title II:

Title III:

Title IV:

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

Stipends for Certified Staff - Bilingual Endorsement

TOTAL COST:	$237,145.07
% ELL COSTS:	100.00%
TOTAL ELL COSTS:	$237,145.07
PER PUPIL AMOUNT (2474 ELL COUNT):	$95.85
M & O:	$237,145.07

Override:

Classroom State Fund:

***Comprehensive School Reform:

**Early Childhood:

*ELL Compensatory Ed:

*ELL Instructional Materials:

**Full Day Kinder:

Appendix J

*Reading First:

*Gear Up:

Rural and Low Incomes:

***Smaller Learning Communities:

Title I - School Improvement:

Title I:

Title II:

Title III:

Title IV:

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

Stipends for Certified Staff - Recruitment/Retention Incentive (Override)

TOTAL COST:	$494,645.70
% ELL COSTS:	10.00%
TOTAL ELL COSTS:	$49,464.57

Appendix J

PER PUPIL AMOUNT (2474 ELL COUNT):	$19.99
M & O:	
Override:	$494,645.70
Classroom State Fund:	
***Comprehensive School Reform:	
**Early Childhood:	
*ELL Compensatory Ed:	
*ELL Instructional Materials:	
**Full Day Kinder:	
*Reading First:	
*Gear Up:	
Rural and Low Incomes:	
***Smaller Learning Communities:	
Title I - School Improvement:	
Title I:	
Title II:	
Title III:	
Title IV:	

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

Stipends for Certified Staff - Translators, Interpreters

TOTAL COST:	$4,060.00
% ELL COSTS:	100.00%
TOTAL ELL COSTS:	$4,060.00
PER PUPIL AMOUNT (2474 ELL COUNT):	$1.64
M & O:	
Override:	
Classroom State Fund:	
***Comprehensive School Reform:	
**Early Childhood:	
*ELL Compensatory Ed:	
*ELL Instructional Materials:	
**Full Day Kinder:	

Appendix J

*Reading First:	
*Gear Up:	
Rural and Low Incomes:	
***Smaller Learning Communities:	$580.00
Title I - School Improvement:	$1,160.00
Title I:	$2,320.00
Title II:	
Title III:	
Title IV:	

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

Student Assessment - Data Management System (Turnleaf)

TOTAL COST:	$21,661.00
% ELL COSTS:	40.65%
TOTAL ELL COSTS:	$8,805.20

Appendix J

PER PUPIL AMOUNT (2474 ELL COUNT):	$3.56
M & O:	
Override:	
Classroom State Fund:	
***Comprehensive School Reform:	
**Early Childhood:	
*ELL Compensatory Ed:	
*ELL Instructional Materials:	
**Full Day Kinder:	
*Reading First:	
*Gear Up:	
Rural and Low Incomes:	
***Smaller Learning Communities:	
Title I - School Improvement:	
Title I:	$21,661.00
Title II:	
Title III:	
Title IV:	

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

Student Assessment - Benchmark Program (Gallileo)

TOTAL COST:	$50,366.28
% ELL COSTS:	40.65%
TOTAL ELL COSTS:	$20,473.89
PER PUPIL AMOUNT (2474 ELL COUNT):	$8.28

M & O:

Override:

Classroom State Fund:

***Comprehensive School Reform:

**Early Childhood:

*ELL Compensatory Ed:

*ELL Instructional Materials:

**Full Day Kinder:

Appendix J

*Reading First:

*Gear Up:

Rural and Low Incomes:

***Smaller Learning Communities:

Title I - School Improvement:

Title I: $50,366.28

Title II:

Title III:

Title IV:

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

Student Assessment - Supplies and Materials for student placement and ELL standards monitoring (incl. District SELP Assessments & training costs)

TOTAL COST: $40,240.26

% ELL COSTS: 100.00%

Appendix J

TOTAL ELL COSTS:	$40,240.26
PER PUPIL AMOUNT (2474 ELL COUNT):	$16.27
M & O:	
Override:	
Classroom State Fund:	
***Comprehensive School Reform:	
**Early Childhood:	
*ELL Compensatory Ed:	
*ELL Instructional Materials:	
**Full Day Kinder:	
*Reading First:	
*Gear Up:	
Rural and Low Incomes:	
***Smaller Learning Communities:	
Title I - School Improvement:	
Title I:	
Title II:	
Title III:	$40,240.26
Title IV:	

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

Summer Camp (Math & Science) - Supplemental instructional materials and field trips

TOTAL COST:	$10,507.62
% ELL COSTS:	30.00%
TOTAL ELL COSTS:	$3,152.29
PER PUPIL AMOUNT (2474 ELL COUNT):	$1.27
M & O:	
Override:	$225.00
Classroom State Fund:	
***Comprehensive School Reform:	
**Early Childhood:	
*ELL Compensatory Ed:	
*ELL Instructional Materials:	
**Full Day Kinder:	

Appendix J

*Reading First:	
*Gear Up:	
Rural and Low Incomes:	$8,525.50
***Smaller Learning Communities:	
Title I - School Improvement:	
Title I:	
Title II:	
Title III:	
Title IV:	$1,757.12

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

Summer Camp (Math & Science) - Stipends for Teachers/Lead Teacher

TOTAL COST:	$9,471.53
% ELL COSTS:	30.00%
TOTAL ELL COSTS:	$2,841.46

Appendix J

PER PUPIL AMOUNT (2474 ELL COUNT):	$1.15
M & O:	
Override:	
Classroom State Fund:	
***Comprehensive School Reform:	
**Early Childhood:	
*ELL Compensatory Ed:	
*ELL Instructional Materials:	
**Full Day Kinder:	
*Reading First:	
*Gear Up:	
Rural and Low Incomes:	$2,309.79
***Smaller Learning Communities:	
Title I - School Improvement:	
Title I:	
Title II:	
Title III:	
Title IV:	$7,161.74

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

Summer School Sheltered Instruction for ELL Students - Stipends for teachers, Reading Specialists, ESL Interventionists, Instructional Aides, Speech Pathologists

TOTAL COST:	$72,640.39
% ELL COSTS:	100.00%
TOTAL ELL COSTS:	$72,640.39
PER PUPIL AMOUNT (2474 ELL COUNT):	$29.36
M & O:	
Override:	
Classroom State Fund:	
***Comprehensive School Reform:	
**Early Childhood:	
*ELL Compensatory Ed:	$3,329.25
*ELL Instructional Materials:	

**Full Day Kinder:

*Reading First:

*Gear Up:

Rural and Low Incomes: $26,357.41

***Smaller Learning Communities:

Title I - School Improvement:

Title I:

Title II:

Title III: $42,953.73

Title IV:

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

Summer School Sheltered Instruction for ELL Students - Supplies and Materials

TOTAL COST: $24,135.83

% ELL COSTS: 100.00%

Appendix J

TOTAL ELL COSTS:	$24,135.83
PER PUPIL AMOUNT (2474 ELL COUNT):	$9.76
M & O:	
Override:	
Classroom State Fund:	
***Comprehensive School Reform:	
**Early Childhood:	
*ELL Compensatory Ed:	
*ELL Instructional Materials:	$7,002.97
**Full Day Kinder:	
*Reading First:	
*Gear Up:	
Rural and Low Incomes:	
***Smaller Learning Communities:	
Title I - School Improvement:	
Title I:	
Title II:	
Title III:	$17,132.86
Title IV:	

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

Summer School - Stipends for Teachers; Readings Teachers/Interventionists; Instructional Aides; Counselors

TOTAL COST:	$187,063.95
% ELL COSTS:	10.00%
TOTAL ELL COSTS:	$18,706.40
PER PUPIL AMOUNT (2474 ELL COUNT):	$7.56
M & O:	
Override:	$64,618.10
Classroom State Fund:	
***Comprehensive School Reform:	$13,920.00
**Early Childhood:	
*ELL Compensatory Ed:	
*ELL Instructional Materials:	
**Full Day Kinder:	

*Reading First:	$46,284.00
*Gear Up:	
Rural and Low Incomes:	
***Smaller Learning Communities:	
Title I - School Improvement:	
Title I:	$62,241.85
Title II:	
Title III:	
Title IV:	

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

Summer School - Materials and Supplies

TOTAL COST:	$40,254.81
% ELL COSTS:	10.00%
TOTAL ELL COSTS:	$4,025.48
PER PUPIL AMOUNT (2474	$1.63

ELL COUNT):	
M & O:	
Override:	$7,243.88
Classroom State Fund:	
***Comprehensive School Reform:	
**Early Childhood:	
*ELL Compensatory Ed:	
*ELL Instructional Materials:	
**Full Day Kinder:	
*Reading First:	
*Gear Up:	
Rural and Low Incomes:	
***Smaller Learning Communities:	
Title I - School Improvement:	
Title I:	$33,010.93
Title II:	
Title III:	
Title IV:	

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

Summer School - Transportation

TOTAL COST:	$38,620.05
% ELL COSTS:	40.65%
TOTAL ELL COSTS:	$15,699.05
PER PUPIL AMOUNT (2474 ELL COUNT):	$6.35

M & O:

Override:

Classroom State Fund:

***Comprehensive School Reform:

**Early Childhood:

*ELL Compensatory Ed:

*ELL Instructional Materials:

**Full Day Kinder:

*Reading First:

Appendix J

*Gear Up:	
Rural and Low Incomes:	$38,620.05
***Smaller Learning Communities:	
Title I - School Improvement:	
Title I:	
Title II:	
Title III:	
Title IV:	

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM COMPONENT DESCRIPTION:

GRAND TOTAL

TOTAL COST:	$17,880,009.99
% ELL COSTS:	
TOTAL ELL COSTS:	$3,885,217.61
PER PUPIL AMOUNT (2474 ELL COUNT):	$1,570.42

Appendix J

M & O:	$12,745,312.52
Override:	$782,279.55
Classroom State Fund:	$459,043.48
***Comprehensive School Reform:	$42,492.30
**Early Childhood:	$83,599.79
*ELL Compensatory Ed:	$3,329.25
*ELL Instructional Materials:	$7,002.97
**Full Day Kinder:	$382,895.13
*Reading First:	$896,390.68
*Gear Up:	$16,704.00
Rural and Low Incomes:	$123,468.64
***Smaller Learning Communities:	$6,148.00
Title I - School Improvement:	$56,300.23
Title I:	$1,894,091.83
Title II:	$105,257.32
Title III:	$266,775.43
Title IV:	$8,918.86

***Only carryover available in 2006-2007 (Comprehensive School Reform, Smaller Learning Communities)

**Reduction in Funding for Future years (Early Childhood, Full Day Kinder, Title III, Title V)

*Not Available for Future years (ELL Compensatory Ed, ELL Instructional Materials, Gear Up, Reading First)

PROGRAM/COMPONENT DESCRIPTION **Additional Needs:**	
TOTAL COST	N/A
% ELL COSTS	N/A
TOTAL ELL COSTS	N/A
PER PUPIL AMOUNT (2474 ELL COUNT)	N/A

PROGRAM/COMPONENT DESCRIPTION **Additional Funds for After school Tutoring, Compensatory Ed. & Summer School (due to reduction in funding)**	
TOTAL COST	$80,000.00

% ELL COSTS	10.00%
TOTAL ELL COSTS	$80,000.00
PER PUPIL AMOUNT (2474 ELL COUNT)	$32.34

PROGRAM/COMPONENT DESCRIPTION **Additional Funds for Increasing Certified Staff Base Pay ($4,000)**	
TOTAL COST	$1,640,100.00
% ELL COSTS	100.00%
TOTAL ELL COSTS	$164,010.00
PER PUPIL AMOUNT (2474 ELL COUNT)	$66.29

PROGRAM/COMPONENT DESCRIPTION **Additional Funds to retain Instructional Aides (due to reduction in funding)**	
TOTAL COST	$150,000.00
% ELL COSTS	30.00%

TOTAL ELL COSTS	$45,000.00
PER PUPIL AMOUNT (2474 ELL COUNT)	$18.19

PROGRAM/COMPONENT DESCRIPTION **Additional Instructional Aides (12)**	
TOTAL COST	$216,000.00
% ELL COSTS	30.00%
TOTAL ELL COSTS	$64,800.00
PER PUPIL AMOUNT (2474 ELL COUNT)	$26.19

PROGRAM/COMPONENT DESCRIPTION **Additional Materials to support ELL program (+10%)**	
TOTAL COST	$47,000.00
% ELL COSTS	100.00%
TOTAL ELL COSTS	$47,000.00
PER PUPIL AMOUNT	$19.00

(2474 ELL COUNT)	

PROGRAM/COMPONENT DESCRIPTION **Additional sections for ELL instruction (10)**	
TOTAL COST	$56,230.00
% ELL COSTS	100.00%
TOTAL ELL COSTS	$56,230.00
PER PUPIL AMOUNT (2474 ELL COUNT)	$22.73

PROGRAM/COMPONENT DESCRIPTION **Additional SEI trainers**	
TOTAL COST	$11,000.00
% ELL COSTS	100.00%
TOTAL ELL COSTS	$11,000.00
PER PUPIL AMOUNT (2474 ELL COUNT)	$4.45

Appendix J

PROGRAM/COMPONENT DESCRIPTION **Additional Staff for Literacy & Language Acquisition Department (Language Assessment, Data Processing & Analysis) 3.0 FTE**	
TOTAL COST	$54,000.00
% ELL COSTS	100.00%
TOTAL ELL COSTS	$54,000.00
PER PUPIL AMOUNT (2474 ELL COUNT)	$21.83

PROGRAM/COMPONENT DESCRIPTION **Funds for ELL model implementation (unknown)**	
TOTAL COST	N/A
% ELL COSTS	100.00%
TOTAL ELL COSTS	$0.00
PER PUPIL AMOUNT (2474 ELL COUNT)	$0.00

Appendix J

PROGRAM/COMPONENT DESCRIPTION **Instructional Software & Hardware for ELL Curriculum**	
TOTAL COST	$202,000.00
% ELL COSTS	100.00%
TOTAL ELL COSTS	$202,000.00
PER PUPIL AMOUNT (2474 ELL COUNT)	$81.65

PROGRAM/COMPONENT DESCRIPTION **Professional Development for Literacy & Language Acquisition Department Staff**	
TOTAL COST	$8,000.00
% ELL COSTS	100.00%
TOTAL ELL COSTS	$8,000.00
PER PUPIL AMOUNT (2474 ELL COUNT)	$3.23

Appendix J

PROGRAM/COMPONENT DESCRIPTION **Professional Development for Teachers on Sheltered Instruction Techniques (+10%)**	
TOTAL COST	$5,000.00
% ELL COSTS	100.00%
TOTAL ELL COSTS	$5,000.00
PER PUPIL AMOUNT (2474 ELL COUNT)	$2.02

PROGRAM/COMPONENT DESCRIPTION **N/A**	
TOTAL COST	$2,469,330.00
% ELL COSTS	N/A
TOTAL ELL COSTS	$737,040.00
PER PUPIL AMOUNT (2474 ELL COUNT)	$297.91

Appendix J

[EXHIBIT 206]

CURRICULAR FRAMEWORK FOR PROVISIONAL STRUCTURED ENGLISH IMMERSION (SEI) ENDORSEMENT TRAINING (15 HOURS)

At the end of 15 hours* of instruction, participants will be able to:

ELL Proficiency Standards Objections

Minimum: *One (1) clock Hour*

1. Examine the format and alignment of ELL Proficiency Standards to the Arizona Language Arts (Listening & Speaking, Reading, and Writing) Academic Standards.

2. Use ELL Proficiency Standards to plan, deliver and evaluate instruction.

3. Demonstrate the integration of ELL Proficiency Standards in all content areas.

Assessment Objectives

Minimum: One (1) Clock Hour

Analyze the content and use of the Arizona English Language Learner Assessment (AzELLA) in guiding ELL instruction.

2. Discuss the relevance of state-mandated achievement for ELLs.

3. Identify and use alternative methods of assessment.

Foundations of SEI Objectives

Minimum: *One (1) Clock Hour*

1. Know the legal, historical and educational reasons for SEI.

2. Know basic SEI terminology.

3. List language acquisition theoretical principles.

4. Define the role of culture in learning.

SEI Strategies Objectives

Minimum: *Eight (8) Clock Hours*

1. Identify and use multiple strategies to improve student achievement.

Integrate:

- Comprehensible input;
- Ongoing specific and immediate feedback;
- Grouping structures and techniques;
- Building background and vocabulary development; and
- Student engagement.

Appendix J

Training time must total 15 clock hours, <u>which includes</u> four (4) flex clock hours to be used at the instructor's discretion to augment any combination of the four areas.

CURRICULAR FRAMEWORK FOR FULL STRUCTURED ENGLISH IMMERSION (SEI) ENDORSEMENT TRAINING (45 CLOCK HOURS)

SBE approved 1/24/2005

At the end of 45 clock hours* of instruction, participants will be able to:

ELL Proficiency Standards Objectives

Minimum: *One Clock Hour*

1. Examine the format and the alignment of ELL Proficiency Standards to the Arizona Language Arts (Listening & Speaking, Reading and Writing) Academic Standards.

2. Use ELL Proficiency Standards to plan, deliver and evaluate instruction.

3. Demonstrate the integration of ELL Proficiency Standards in all content areas.

Data Analysis & Application Objectives

Minimum: *Three Clock Hours*

1. Analyze and apply disaggregated data to differentiate instruction.

2. Interpret and use "snapshots" of longitudinal data.

3. Track student status and progress on the ELL proficiency standards using the Arizona English Language Learner Assessment (AzELLA) results.

Formal & Informal Assessment Objectives

Minimum: *Three Clock Hours*

1. Integrate diagnostic formative, and summative assessments for ELLs.

2. Create and offer multiple assessments.

3. Use assessment results for placement and accommodation for special education and gifted students.

4. Use standardized testing and language proficiency as methods for monitoring student progress.

SEI Foundations Objectives

Minimum: *One Clock Hour*

1. Know the legal, historical and educational reasons for Structured English Immersion (SEI).

2. Know basic SEI terminology.

3. List language acquisition theoretical principles.

4. Outline the role of culture in learning.

5. Introduce Basic Interpersonal Communication Skills (BICS) and Cognitive Academic Language Proficiency (CALP).

Learning Experiences SEI Strategies Objectives

Minimum: *25 Clock Hours*

1. Identify and use multiple strategies to improve student achievement.

Integrate:

- Comprehensible input;
- Ongoing specific and immediate feedback;
- Grouping structures and techniques;
- Building background and vocabulary development; and
- Student engagement.

2. Extend SEI methods for beginning ELD (TPR Storytelling), contextual clues, Narrative Approach).

3. Describe the Silent Period (ways of responding, developmental processes).

4. Grasp meaning of pre-and early production strategies of students.

5. Integrate current materials in ELD instruction (lesson & text modifications).

6. Extend SEI content methods (preview/ review, content area reading & writing strategies, experiential methods.

7. Analyze and apply vocabulary development approaches in the content areas.

8. Plan lessons based on prior knowledge.

9. Select, adapt, and sequence current curricular materials.

Parent/Home/School Scaffolding Objectives

Minimum: *Three Clock Hours*

1. Identify the socio-cultural influences of ELLs (language shift, identity issues, role of culture in learning).

2. Discuss the impact of bilingualism and home language use.

3. Examine parental and community sources for aiding English Acquisition.

4. Cultivate home and school partnerships.

****Training time must total 45 clock hours, which includes nine (9) flex clock hours to be used at the instructor's discretion to augment any combination of the four areas.***

Law Regarding SEI Endorsement

Appendix J

15-756.09. Teacher training

A. The state board of education shall determine the qualifications necessary for a provisional and full structured English immersion endorsement.

B. Training may be allowed that is not provided by a college or university to substitute for any of the courses required for a structured English immersion endorsement or a bilingual education endorsement if all of the following conditions apply:

1. The state board of education has reviewed the curricula, textbooks, grading procedures and attendance policies and determined that the training is comparable in amount, scope and quality to a course offered by a college or university for a structured English immersion or bilingual education endorsement.

2. The training meets the professional teaching standards adopted by the state board of education.

3. The state board of education has reviewed the qualifications of the instructor and determined that the instructor has sufficient experience to effectively conduct the training.

C. The state board of education shall require all approved teacher training programs that provide a degree in education to require courses that are necessary to obtain a full structured English immersion endorsement.

Appendix J

15- 1626. SEC. 16 General administrative powers and duties of board

16. Require universities that provide a degree in education to require courses that are necessary to obtain a provisional structured English immersion endorsement as prescribed by the state board of education.

R7-2-613. Endorsements

J. Structured English Immersion (SEI) Endorsements -- grades K-12

1. From and after August 31, 2006, an SEI, ESL or bilingual endorsement is required of all classroom teachers, supervisors, principals and superintendents. For purposes of this rule, "supervisor," "principal" and "superintendent" means an individual who holds a supervisor, principal or superintendent certificate.

2. The provisional SEI endorsement is valid for three years and is not renewable. The requirements are:

a. An Arizona elementary, secondary, special education, career and technical education, supervisor, principal or superintendent certificate; and

b. For teachers, supervisors, principals and superintendents certified on or after August 31,

2006, three semester hours of courses in Structured English immersion methods of teaching English Language Learner (ELL) students, including but not limited to instruction in SEI strategies, teaching with the ELL Proficiency Standards adopted by the Board and monitoring ELL student academic progress using a variety of assessment tools; or

c. For teachers, supervisors, principals and superintendents certified before August 31, 2006, one semester hour or 15 clock hours of professional development in Structured English Immersion methods of teaching ELL students, including but not limited to instruction in SEI strategies, teaching with the ELL Proficiency Standards adopted by the Board and monitoring ELL student academic progress using a variety of assessment tools through a training program that meets the requirements of A.R.S. § 15-756.09(B).

3. The requirements for the SEI endorsement are:

a. An Arizona elementary, secondary, special education, career and technical education, supervisor, principal, or superintendent certificate, and;

b. Qualification for the provisional SEI endorsement, and either:

i. Three semester hours of courses related to the teaching of the English Language Learner Proficiency Standards adopted by the State Board of Education, including but not limited to instruction in SEI strategies, teaching with the ELL Proficiency

Standards adopted by the Board and monitoring ELL student academic progress using a variety of assessment tools; or

ii. Completion of 45 clock hours of professional development in the teaching of the English Language Learner Proficiency Standards adopted by the State Board of Education, including but not limited to instruction in SEI strategies, teaching with the ELL Proficiency Standards adopted by the Board and monitoring ELL student academic progress using a variety of assessment tools through a training program that meets the requirements of A.R.S. § 15-756.09(B).

4. Nothing in this rule prevents school districts from requiring certified staff to obtain an ESL or bilingual endorsement as a condition of employment.

Appendix J

[EXHIBIT 209]

District Monitoring

- The Monitoring process was previously directed by Board Rule R7-2-306 (Flores Consent)

- On September 21, 2006, A.R.S. 15-756.08 (HB 2064) replaced R7-2-306 and became the new mandate for the monitoring process. (See attachment)

Appendix J

Arizona State Legislature

Forty-eighth Legislature - First Regular Session

15-756.08. Monitoring; corrective action plan

A. The superintendent of public instruction shall direct the office of English language acquisition services in the department of education to:

1. Monitor each year at least twelve school districts or charter schools from the fifty school districts or charter this state with the highest number of English language learners. The department of education shall monitor all fifty school districts or charter schools with the highest number of English language learners in this state at least once every four years.

2. Monitor each year at least ten school districts or charter schools that are not included in the fifty school districts or charter schools described in paragraph 1.

3. Monitor each year at least ten school districts or charter schools that are not required to provide instruction for English language learners for a majority of their grade levels.

4. Choose, based on the department's review of reports submitted by school districts and charter schools, the school districts and charter schools described in paragraphs 1, 2 and 3.

5. Select a random sample of three hundred English language learners each month to determine:

(a) How many of the sample can read the randomly ordered alphabet in thirty seconds or less.

(b) How many of the sample can read a randomly sorted list of thirty single-syllable words in one minute or less.

B. The monitoring required by this section shall be on-site monitoring and shall include classroom observations, curriculum reviews, faculty interviews, student records, a review of English language learner programs and an analysis of programmatic effectiveness, at a minimum, to include prior year data that analyze the progress of English language learners.

C. Based on the results of the monitoring, the department shall determine whether or not the school district or charter school is complying with state and federal laws applicable to English language learners.

D. The department shall issue a report of the results of the monitoring within forty-five days after completing the monitoring.

E. Within sixty days following the issuance of the department's report, the school district or charter school receiving the report shall prepare and submit to the department a corrective action plan, in a manner prescribed by the state board of education, that sets forth steps that will be taken to correct the deficiencies, if any, noted in the department's report.

F. Within thirty days after receiving a school district's or charter school's corrective action plan, the department shall review the corrective action

plan and may require changes to the corrective action plan.

G. After the department has reviewed a school district's or charter school's corrective action plan and made any changes the department deems necessary, the department shall return the corrective action plan to the school district or charter school.

H. Within thirty days after receiving a corrective action plan back from the department, the school district or charter school shall begin implementing the measures set forth in the corrective action plan.

I. The department shall conduct a follow-up evaluation of the school district or charter school within one year after the department returned the corrective action plan to the school district or charter school.

J. In conducting the follow-up evaluation, if the department finds that the school district or charter school is not in compliance with state and federal laws applicable to English language learners, the department shall refer the school district or charter school to the state board of education for a finding of noncompliance. A school district or charter school found by the board to be noncompliant shall not continue to receive any monies from the Arizona structured English immersion fund established by section 15-756.04 for English language learners and shall not reduce the amount of monies spent on the school district's or charter school's English language

learner programs despite the loss of monies caused by the noncompliance.

K. The department shall monitor each school district or charter school that the state board of education has found to be noncompliant and that is not receiving Arizona structured English immersion fund monies pursuant to subsection J of this section to ensure that the school district or charter school does not reduce the amount of monies spent on the school district's or charter school's English language learner programs despite the loss of Arizona structured English immersion fund monies caused by the noncompliance.

Overview of 2005 — 2006 Monitoring Results

All monitoring for the 2005-2006 year was completed based on the state board of education rule R7-2-306, which is posted below.

R7-2-306

J. Monitoring of ELL programs.

1. Each year the department shall monitor at least 32 LEAs, as follows:

a. At least 12 of the 50 LEAs with the highest enrollment:

b. At least 10 LEAs with ELLs that are not included in the 50 described above.

c. At least 10 LEAs that have reported that they have 25 or fewer ELL students in their schools; and

d. Other LEAs upon receipt of a documented written complaint form any Arizona resident, the

U.S. Department of Education, or the U.S. Office for Civil Rights, alleging that the LEA is not complying with state of federal law regarding ELLS.

2. All of the 50 LEAs in subsection (J)(1)(a) shall be monitored by the Department at least once every four years.

3. The monitoring shall be on-site monitoring and shall include classroom observations, curriculum reviews, faculty interviews, student records reviews, and review of ELL programs. The Department may use personnel from other schools to assist in the monitoring.

4. The Department shall issue a report on the results of its monitoring within 45 days after completing the monitoring. If the Department determines that an LEA is not complying with state or federal laws applicable to ELL students, the LEA shall prepare and submit to the Department, within 60 days of the Department's determination, a corrective action plan that sets forth steps that the LEA will take to correct the deficiencies noted in the report.

5. The Department shall review and return such corrective action plan to the LEA within 30 days, noting any required changes. No later than 30 days after receiving its corrective action plan back form the Department, the LEA shall begin implementing the measures set forth in the plan, including any revisions required by the Department.

6. The Department shall conduct a follow-up evaluation of the LEA within one year after returning the corrective action plan to the LEA.

7. If the Department finds continued non-compliance during the follow-up evaluation, the LEA shall be revered to the Board for a determination of non-compliance. If the Board determines the LEA to be out of compliance with state or federal laws applicable to ELL students, it may take one or more of the following actions:

a. Temporarily withhold cash payments of federal ELL grant monies;

b. Disallow (that is deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance;

c. Wholly or partly suspend or terminate the current award of federal ELL grant monies;

d. Withhold further awards of federal ELL grant monies for the program.

8. the Department shall monitor all LEAs that the Board has determined to be non-compliant and which have had federal ELL grant monies withheld or terminated to ensure that such LEAs do not reduce the amount of funds spent on their ELL programs as the result of its loss of funds.

* * *

Appendix J

[EXHIBIT 214]

Nogales Unified School District Report

March 14 - 15, 2006

The English Acquisition Services (EAS) unit conducted a visit to the Nogales Unified District to gather information regarding the various schools within the district. The Arizona Department of Education (ADE) Research and Evaluation unit completed a list of schools, whose English Language Learner (ELL) student count was over 100; whose students were classified as ELL in 2003, and; the list gave a rank order of the percentage of ELL students that passed the AIMS assessment in 2005. The list consisted of 628 schools within the state of Arizona. Nogales Unified District had four schools within the top 10 ranked schools; five schools within the top 50 ranked schools in Arizona.

The EAS unit visited each school within the Nogales district to review class sizes, teacher/pupil ratios, paraprofessional ratios, ELL programs, curriculum utilization across all content areas, conduct teacher interviews and administration interviews. EAS also reviewed parent-community involvement/activities, professional development information, technology within classrooms, tutoring services and each individual's view of why they believe the students at the school are successful. An interview with Superintendent Zamudio provided the team with information regarding the Nogales School District. The district student population currently is

approximately 98% Hispanic and 75+% are considered ELL, with 518 kindergarten students identified as ELL.

The team determined that there were **four** main components that each school had in common that contribute to student success:

1. The first component was the intervention and extra support services that the schools are implementing during their reading and language blocks for all students, based on proficiency levels of the students.

2. The second component is that each school offers mainstream classrooms and Structured English Immersion (SEI) classes for the ELL students during their reading and language blocks with additional support for the acquisition of the English language.

3. The third component was the tutoring and additional support services the schools were offering students before, after, during summer school for students who are not achieving at grade level.

4. The last component was the implementation of the Gallileo, which is an assessment and data system which allows each teacher analyze the student and classroom achievement on the academic standards and to focus on areas that are weak, or need additional teaching and support.

Each school has no paraprofessionals designated specifically for SEI classrooms. Each school also has minimal technology within the classrooms, with a computer available for each

teacher, but very few within classrooms for student use. Each school does have computer labs available for student use. The schools are using a variety of curriculum. The following information is broken down by each school, with specific focus on the eleven areas the team reviewed: 1) School; ranking; % passed on AIMS; 2) average student population within each classroom; 3) Number of paraprofessionals observed in classrooms; 4) Curriculum utilized in classrooms; 5) Type of data utilized; 6) Technology available within classrooms; 7) Intervention and support services offered; 8) Tutoring services available; 9) Parent involvement with the school; 10) Professional development available for teachers; 11) What student success is attributed to.

Vasquez De Coronado Francisco School

Ranking: #3 ELL#: 637 %Passed in '05: 78.06

2. Average classroom population: 28

3. Paraprofessionals: None.

4. Curriculum: Houghton-Mifflin > Reading
Saxon > Math
SRA (Real) > Science
(additional) Blast-off > Reading/Writing/Math (AIMS support)
(supplemental) > Steck Vaughn (enrichment)

Appendix J

Students are grouped for reading blocks; the lowest reading groups have additional intervention during the day.

5. Data utilized: AIMS; Terra Nova; NWEA; Writing Samples using ADE 6 Trait Rubric; Gallileo

6. Technology in classrooms is minimal; only teachers have computers. Students have computer lab once a week. Teachers use overhead projectors and videos to assist lessons.

7. Lowest reading groups receive additional intervention support during the day.

8. Tutoring is scheduled for before, after and summer school.

9. Parent involvement includes parent-teacher conferences, open house, bake sales by PTA. Grades are on-line and students take weekly work home for parents to sign and return to teachers, which allows parents to know what their child completes each week.

10. Professional development: SEI, 6 Trait Writing, Gallileo data training, technology training.

11. Success was attributed to principal-teacher teamwork, lessons aligned to state standards and parent involvement.

Appendix J

Robert Bracker Elementary
Ranking: #4 ELL#: 291 %Passed in '05: 75.94

2. Average classroom population: 20

3. Paraprofessionals: None.

4. Curriculum:

Harcourt Trophies >	Reading	
Saxon >	Math	
Social Studies >	up for adoption (Arizona)	
Science >	up for adoption (interactive - Windows)	

(additional) Blast-off > Reading/Math/Writing (AIMS support)
(supplemental) > ELL Resource Kits (intervention)

Core language blocks are 90 minutes. Intervention classes are an additional 40 minutes per day, where students are grouped by proficiency level and assisted by reading and writing specialists.

5. Data utilized: AIMS; Terra Nova; DIBELS; SELP; Gallileo; Writing Samples; end of theme assessments; student assessment binders.

6. Technology in classrooms is minimal; students visit the computer lab once a week, perhaps twice a week. It is very difficult for ELL students to utilize the Gallileo assessment piece on the computer, so the

school has returned to paper/pencil assessment with Gallileo.

7. Intervention support services is the "push-in" program, where students remain in classrooms and all specialists and elective teachers are brought into classrooms to assist students who are grouped by proficiency and receive small group instruction. Very basic ELL students receive an additional 40 minutes per day to address "basic phonemic awareness and language acquisition skills." There is a reading coach and reading specialist to assist teachers.

8. Tutoring is scheduled for before, after and summer school.

9. Parent involvement includes "Parent Power" which is monthly meeting where grade levels present information in an activity format to show parents what students are learning. A family night with access to the computer lab is available and an Adult Education teacher is available for translation services.

10. Professional development has included SEI and Reading 1st training.

11. Student success is attributed to team work between administration, teachers, students and parents. Also, consistency in all grade levels and student expectations, teachers analyzing data and the intervention services available to students.

Appendix J

Lincoln Elementary School
Ranking: #7 ELL#: 408 %Passed in '05: 71.07

2. Average classroom population: 21

3. Paraprofessionals: None.

4. Curriculum: Houghton-Mifflin >
Reading/Spelling/Vocabulary
Saxon > Math
SRA - (Real) > Science
(additional) Blast-off > Reading/Writing/Math
(AIMS support)
Scholastic > Leveled readers
Phonics Library > Phonemic awareness
Writing Traits Kit > Writing

5. Data utilized: AIMS; Terra Nova; DIBELS; SELP; Gallileo; Houghton-Mifflin benchmarks.

6. Technology within classrooms is very minimal.

7. Intervention and support services are conducted during the day, with students being grouped according to proficiency levels and students with poor language skills receiving instruction in small group settings.

8. Tutoring services are after school and summer school. This is a Reading 1st and Title I school.

9. Parent involvement includes a monthly parent night, homework folders that student show parents

student work on a daily basis, open house, parent-teacher conferences and an open door policy.

10. Professional development: SEI, SIOP, SDAIE, 6 Trait Writing, Curriculum mapping, Technology Across the Curriculum training.

11. Student success is attributed to parent involvement, student planners that keep parents informed, teamwork and professional development.

Challenger Elementary School
Ranking: #8 ELL#: 720 %Passed on '05: 69.16

2. Average classroom population: 21 approximately
ELL: 75%

3. Paraprofessionals: None.

4. Curriculum: Houghton-Mifflin > Reading
Harcourt > Reading
Harcourt > Math
Saxon > Math

5. Data utilized: AIMS; Terra Nova; DIBELS; SELP; Gallileo.

6. Technology in classrooms consisted of approximately 2 computers within each classroom; the teachers did have the capability to hook their pc to the television within the class.

7. Intervention consists of 40 minutes per day, where students are grouped by proficiency levels.

8. Tutoring services are after school and summer school.

9. Parent involvement includes open house and parent-teacher conferences with translators available.

10. Professional development: Project Success; SEI; Spaulding; Reading 1st; AIMS Support; Curriculum mapping; SDAIE; 6 Trait Writing; SIOP.

11. Success was attributed to parent involvement, teacher and student motivation and teacher expectations.

A.J. Mitchell Elementary School
Ranking: MI ELL#: 692 %Passed in '05: 59.68

2. Average classroom population: 24

3. Paraprofessionals: None.

4. Curriculum:
Harcourt > Reading
Harcourt > Math
Saxon > Math
SRA (Real) > Science
Time/Scholastic > Social Studies

(additional)
Scholastic > Leveled readers
Into English > ESL readers
ELL Resource Kit > ESL
LeapFrog materials > ESL

5. Data utilized: AIMS; DIBELS; SELP; Terra Nova; Gallileo; district benchmarks.

6. Technology was minimal within classrooms; however, there are 2 computer labs available to students.

7. Intervention and support consisted of phonics instruction and grouping students for reading by proficiency level on a daily basis. Intervention services are in addition to the regular language classes for students. Students are also able to attend tutoring services twice a week, if their scores are low. SELP and DIBELS scores are analyzed for intervention placement and services.

8. Tutoring services are provided after school and summer school.

9. Parent involvement includes Adult Education English classes, parent technology classes, and after school homework club is available at the De Anza Rec Center.

10. Professional development: Technology instruction, Powerschool training, SEI, SIOP, SDAIE, 6 Trait Writing, Reading 1st, Curriculum Mapping, Gallileo training on a weekly basis, DIBELS benchmark training.

11. Student success is attributed to teaching to standards, school-wide intervention with small class size groupings, Reading 1st, parent involvement, SEI training and positive self-esteem.

Appendix J

Marv L. Welty Elementary School
Ranking: 152 ELL#: 371

2. Average classroom population: 27

3. Paraprofessionals: None.

4. Curriculum: Voyager > Reading
Saxon > Math
SRA (Real) > Science
Houghton-Mifflin > Science

(additional) Advanced Reader > Model 05
Scholastic > Leveled readers
DRA > Reading

5. Data utilized: AIMS; Terra Nova; DIBELS; SELP; district assessments; Gallileo.

6. Technology was limited to a couple of computers within the classrooms.

7. Reading intervention was school-wide with students being grouped by proficiency levels; much smaller class sizes during this time.

8. Tutoring is after school, summer school and Title I.

9. Parent involvement includes parent-teacher conferences, open house, family computer night, and parenting skill classes.

10. Professional development: SEI; SDAIE; SIOP; 6 Trait Writing; Reading 1st; Voyager training; Gallileo training; Technology training.

11. Student success is attributed to parent involvement, Reading 1st, SEI support.

Desert Shadows Middle School
Ranking: 165 ELL#: 1209 %Passed on '05: 49.87

2. Average classroom population: 31

3. Paraprofessionals: None

4. Curriculum: Holt Elements of Language > Language
Holt Elements of Literature > Reading
Saxon > Math
Our World Today > Social Studies
(supplemental) AIMS Reading Skill Builder High Point > ELL

The staff has developed intervention guidebooks for each grade level and subject level. These guidebooks focus on the academic content standards, with a list of resource materials available for instructional support and intervention.

5. Data utilized: Gallileo; AIMS; NWEA.

6. Technology consists of a computer lab available for student use; teachers have computer which they utilize for Gallileo.

7. Interventions include AIMS Skill-building class, 6th grade Study Skills class, a Study Skills class for reading, Home Room has themes for each quarter such as test taking skills for 95 minutes every other day and a supplemental reading support daily.

8. Tutoring is available three times a week after school.

9. Parental involvement includes a Senate committee consisting of parents, teachers and students, parent liaison, parent newsletter and parent mailings involving grades and student progress.

10. Professional development: SEI; Gallileo; Reading; Technology; Powerschool; PowerGrades.

11. Student success was attributed to the Gallileo program where teachers analyze data which drives instruction.

Wade Carpenter Middle School
Ranking: #409 ELL#: 1176 %Passed in '05: 39.54

2. Average classroom population: 26

3. Paraprofessionals: None.

4. Curriculum: Holt Elements of Literature > Reading
Holt Elements of Language >

Appendix J

Language
Saxon > Math
Holt > Science
Our World Today (Glencoe) > Social Studies
**classroom sets of textbooks only

5. Data utilized: Gallileo; AIMS;

6. Technology is minimal.

7. Intervention consists of students being grouped by proficiency levels for reading. Additional classes for students who have not passed AIMS are required.

8. Tutoring is scheduled for 7th period, after and summer school; Princeton support services are available after school.

9. Parent involvement includes monthly literature and math nights and open house.

10. Professional development: SEI; Gallileo data analysis training; 6 Trait Writing.

11. Success is attributed to Saxon math, tutoring, vocabulary intervention and Sword to Success program.

Nogales High School
Ranking: #575 ELL#: 1371 %Passed in '05: 28.37

2. Average classroom population: 22

3. Paraprofessionals: None.

4. Curriculum: Holt Elements of Literature > Reading
Holt Elements of Language > English
(additional) Literature Analysis
Reading Strategies > all grades
AIMS Reading

5. Data utilized: AIMS; Terra Nova; Gallileo; district quarter assessments.

6. Technology includes several computer labs for student use; teachers have a computer in each classroom.

7. Intervention includes AIMS reading courses and basic reading strategy classes.

8. Tutoring is scheduled for after and summer school; mandatory for students with poor AIMS scores.

9. Parent involvement includes parent-teacher conferences, a parent liaison, and an AIMS meeting to inform parents what to expect and how to assist during AIMS assessment week.

10. Professional development: SEI; SIOP; Gallileo.

11. No comments were given regarding student success.

Santa Cruz Alternative High School
Ranking: #625 ELL#: 197 %Passed in '05: 8.62

2. Average classroom population: 20

3. Paraprofessionals: None.

4. Curriculum: Same as Nogales High with ancillary materials

5. Data utilized: AIMS; Writing assessments; Gallileo; Reading (Lexia).

6. Technology includes computers in all classrooms for students to use with Microsoft Office, Fast Track courses, Plato software, reading/writing/math programs and a 30 pc lab.

7. Intervention includes a internet on-line based program; with teachers analyzing data of student progress; U of A reading program.

8. Tutoring includes Saturday school, every day after school and summer school.

9. Parent involvement includes teacher communicating daily and weekly with all parents regarding student progress.

10. Professional development: SEI; Technology; Novel Stars; Data disaggregation.

11. Student success is attributed to manipulatives and interactive computer technology coursework.

Appendix J

[EXHIBIT 221]

Schools shine brightly in latest testing results

With only a few exceptions, every grade in the Nogales Unified School District made noteworthy progress in every subject on the latest round of AIMS testing.

Supt. Dr. Guillermo Zamudio said that regardless of how the scores were compared, students improved in every single area except for third grade writing and tenth grade math. He attributed the gains to a variety of reasons, including having high expectations for all students, holding both employees and students accountable, creating. extended opportunities for learning, and making decisions based on an analysis of data.

"I want to thank everyone involved, including the school board for its vision and direction," Dr. Zamudio said, "We could not have gotten these results without the efforts of the principals, staff, and students working together."

What is especially gratifying is that students outscored state averages even when distinctions were made between fluent English-speaking students and English Learners. For example, the 31% of the English Learner students statewide passed reading at the third grade level while 63% of NUSD students passed. Only 13% of ELL students state-wide passed 10th grade writing while 25% of Nogales High School students did so.

Appendix J

There is an irony in the results, however. Despite the strong scores when compared to state averages, some schools may not have earned a label: as making Adequate Yearly Progress (AYP) because the students did not reach preset benchmarks even though they improved over the previous year. For example; the benchmark for ELL students in the 10th grade is 35%, but a survey of the scores from districts throughout the state showed that no school with a similar population to NUSD even came close to that mark.

In fact, when compared to other districts with high Hispanic populations, NUSD outscored those schools at almost every grade level and in all three subject areas of reading, writing, and math with only a few exceptions.

When the scorn of fluent English-speaking students were disaggregated, the results were even more dramatic. For example, at the third-grade level, only 75% of the students mastered the reading test while fully 90% of NUSD students did so. At the 10th grade level, 70% statewide passed writing while 82% of Nogales High School students did so.

In all this good news, there does remain a major concern, Dr. Zamudio said. That is the "achievement gap" between fluent English speakers and ELL students. For example, in NUSD fifth-graders, 85 percent of fluent English speakers passed the fifth-grade writing test while only 53% of ELL students did so. That wide a gap is "unacceptable," Dr. Zamudio said, and officials are working very diligently to provide ELL students with the extra help they need to catch up to their fluent peers.

Appendix J

The problem becomes even more intense when Spanish-speaking students enter a district school at an upper grade level. If a student enrolls at Nogales High School as a freshmen with virtually no English skills, it is extremely challenging for him or her to pass the ADMS by graduation.

"We are very proud of how far we have come, but we are not resting. We know we have a long way still to go and challenges ahead," Dr. Zamudio said.

Appendix J

[EXHIBIT 223]

• **(Failing Schools) State Tutoring Fund: Summary of Tutor Funds Paid from ARS § 15-241(0) and High School AIMS Tutoring Chart. Dated 10/17/06**

This chart shows that NUSD took advantage of funds only for 2004-05 ($8,875.00). NUSD never applied for funds except for this year.

• **AIMS Performance of Students Receiving Tuition in 2004-05 Report from ADE's Research & Evaluation (August 2005)**

This report reflects how over 6,000 students took advantage of the state tutoring program and that 88% of ELLs improved at least one performance level in at least one subject area.

• **2003-2004 AIMS Intervention/Dropout Prevention Grant Awardees List**

This list documents the five grantees for a total of $474,711. Nogales never submitted an application for funds.

• **2004-2005 AIMS Intervention/Dropout Prevention Awardees List**

This list documents the five grantees for a total of $474,711. Nogales never submitted an application for funds.

• **2005-2006 AIMS Intervention/Dropout Prevention Awardees List**

This list reflects the renewal of the 04-05 awardees, including two additional rounds of funding totaling $5,296,488, after the state received this increase for the fund. This also reflects that NUSD

never applied for either round of new funding during this time frame.

- **2006-2007 AIMS Intervention/Dropout Prevention Renewal Allocations**

This document reflects how the $5.2 million is being distributed for this current school year. Nogales did not apply for these funds once again in '06-'07.

Nogales Unified School District (NUSD) took advantage of part of the initial $10 million funding from the (Failing Schools) State Tutoring Fund in 2005 for juniors who failed one or more section of the AIMS. The overall results from that one year reflect that 88% of ELLs moved up at lease one performance level in at least one subject area. However, Nogales failed to continue to seek this funding after the Spring of 2005. The program covers the cost of tutors, in order to further assist high school students who failed one or more sections of the AIMS test. The State Tutoring Fund also provides free tutoring for any student in an underperforming/failing school. 2006 summer tutoring was included for those seniors who had not met the reading, writing and mathematics Standard in order to graduate with a diploma. In addition, an amendment to ARS § 15-241(Q) provides for resources to assist students in passing the AIMS test. Therefore, the AIMS High School Study Guides were funded out of the 2006-07 funds to support all high school students in preparing for the AIMS test, as well including Guides for all four grades (9-12).

Appendix J

Nogales Unified School District (NUSD) failed to take advantage of the AIMS Intervention/Dropout Prevention (grant) program, reflective of ARS § 15-809. ADE manages this program and its 2003-2006 records illustrate no funding request from NUSD to assist high school students in meeting AIMS Standard(s) with a minimum of nine consecutive months of academic support, including tutoring and remediation; comprehensive instruction in the Arizona workplace skills; leadership and civic duty opportunities and the opportunity to provide twelve months of followup once a student graduates. Since the ADE has managed this grant, the program has increased and grown from approximately $515,000 (five grantees), to $5.2 million in 2006.

The "landscape" of funding has changed dramatically for Arizona's schools regarding increased funding and support to assist students in meeting the state's academic standards (AIMS) with tutoring, resources and technical assistance provided by the State. Both the (Failing Schools) State Tutoring Fund ($1.5 million each year and non-reverting) and the AIMS Intervention/Dropout Prevention Program (now $5.2 million) are new resources in place since 2000 that were not in place prior. The Flores vs. Arizona case contends that Nogales Unified needs funding for tutors and resources to fund teachers to work after school hours. Again, the aforementioned programs have been providing this funding through state resources.

Appendix J

[EXHIBIT 225]

Since the Findings of Fact and Conclusions of Law, issued January 24, 2000, in the matter of Miriam Flores v. State of Arizona, et. al., there have been significant changes in the funding of English Language Learners in Arizona. Truly the landscape has changed so that certain assumptions made on January 24, 2000 are no longer valid.

Prior to Public Law 107-110, NCLB, English language learners were not identified as a special class. In many cases they were never tested and were allowed to languish behind their English speaking peers. With passage of the No Child Left behind Act, which reauthorized the Elementary and Secondary Education Act of 1965, English language learners have become one of the unique populations identified for tracking to ensure they attain academic performance at a level on par with their peers.

Specifically, Sec. 1001 of P. L. 107-110, The No Child Left Behind Act of 2001, contains the following language concerning the purpose of Title I funds:

2) *meeting the educational needs of low-achieving children in our Nation's highest-poverty schools,* ***limited English proficient children,*** *migratory children, children with disabilities, Indian children, neglected or delinquent children, and young children in need of reading assistance;*

In Plaintiffs Brief Regarding Sufficiency of House Bill 2064 filed March 24, 2006, on page 18, line 3, reference is made to the study provided by the National Conference of State Legislators. While the

study has significant flaws it provided the following guidance:

"In addition, schools receiving formula-based Title I funds must involve ELL students."

"Not only are ELL children and youth specifically referenced in numerous places throughout Title I: Part A and in Title I: Part C, but ELL children and youth tend to be from economically disadvantaged families and tend to be enrolled in schools that serve a high number of low-income families, which is addressed throughout Title I. As referenced above, Title I funding is extremely large. However, many people are not aware of the extent to which Title I can, and should, serve ELL students. These are funds that can be used to:

- Develop or purchase educational programs,
- Develop or purchase assessments,
- Purchase software and other technological aids,
- Provide professional development for all educational staff,
- Require high-quality, highly prepared teachers (particularly in Subpart A),
- Require high-quality, highly prepared educational aides (particularly in Subpart A),
- Provide educational programs for ELL students' extended families,
- Involve ELL students' extended families in the education of their children,
- Improve school libraries (particularly in Subpart B), and
- Improve statewide databases (particularly in Subpart A)."

Appendix J

It should be noted that Title III funds are specifically earmarked,

"to help ensure that children who are limited English proficient, including immigrant children and youth, attain English proficiency, develop high levels of academic attainment in English, and meet the same challenging State academic content and student academic achievement standards as all children are expected to meet;"

In addition to changes in the law governing how ELL students are perceived there have been significant changes in the funds available for all students including ELL Students both at the State and federal levels.

Using information provided by the Joint Legislative Budget Committee on their WEB site at http://www.azleg.gov/jlbc.htm, since the 2000 fiscal year K-12 state, local and county equalization funding for maintenance and operations has increased from $3,431,059,000 to an estimated $4,849,063,800 in the 2006 fiscal year.

Equalization Funding of Maintenance and Operations

FY 2000	$3,431,059,000
FY 2001	$3,583,655,400
FY 2002	$3,803,484,200
FY 2003	$4,060,362,800
FY 2004	$4,275,562,028
FY 2005	$4,553,343,200
FY 2006	$4,849,063,800

Based on the numbers provided above, the funding for maintenance and operations, on a per student basis, has increased from $4,084 in the 2000

fiscal year to $4,837 in the 2006 fiscal year as shown by the table below.

Per Pupil Funding of Maintenance and Operations	
FY 2000	$4,084
FY 2001	$4,216
FY 2002	$4,327
FY 2003	$4,480
FY 2004	$4,579
FY 2005	$4,689
FY 2006	$4,837

In addition to the significant increases school districts have received in their equalization funding from 2000 to 2006, school districts have received significant additional funding from two other discreet sources. First, additional funds for capital improvements have come from the School Facilities Board, as a result of the Students First legislation. The tables below identifies these funds. While these funds are not earmarked exclusively for ELL students, they provide benefits for those students.

School Facilities Board	
FY 2000	$317,500,000
FY 2001	$992,725,300
FY 2002	$172,815,300
FY 2003	$753,274,100
FY 2004	$497,100,000
FY 2005	$424,000,000
FY 2006	$340,000,000

Second, Proposition 301, passed by Arizona voters in November 2000, provided significant increases in funds to school districts. A.R.S. § 15-977 requires that school districts allocate forty per cent of

the monies for teacher compensation increases based on performance and employment related expenses, twenty per cent of the monies for teacher base salary increases and employment related expenses and forty per cent of the monies for maintenance and operation. The table below summarizes these funds.

Proposition 301 Funds	
FY 2002	$235,346,200
FY2003	$341,796,000
FY2004	$330,375,200
FY2005	$379,639,700
FY2006	$494,572,500

In addition to changes in the equalization formula used to fund schools, the State of Arizona appropriated funds specifically designated for ELL students as a result of HB 2010. These funds are summarized in the table below.

PURPOSE	
FY 2002	N/A
FY 2003	N/A
FY 2004	N/A
FY 2005	N/A

PURPOSE
Cost study of Group B ELL weight

FY 2002	N/A
FY 2003	$500,000
FY 2004	N/A
FY 2005	N/A

PURPOSE **Teacher Training**	
FY 2002	N/A
FY 2003	$4,500,000
FY 2004	$4,500,000
FY 2005	$4,500,000

PURPOSE **Compensatory instruction for ELL pupils**	
FY 2002	$3,080,000
FY 2003	$5,500,000
FY 2004	$5,500,000
FY 2005	$5,500,000

Appendix J

PURPOSE **Instructional materials and supplies**	
FY 2002	N/A
FY 2003	$1,500,00
FY 2004	$1,500,00
FY 2005	$1,500,00

PURPOSE **Monitoring**	
FY 2002	$158,050
FY 2003	$316,095
FY 2004	$316,095
FY 2005	$316,095

PURPOSE **English learner classroom personnel bonus fund**	
FY 2002	N/A
FY 2003	$3,060,000

FY 2004	$3,060,000
FY 2005	$3,060,000

PURPOSE **Pilot program**	
FY 2002	N/A
FY 2003	$750,000
FY 2004	$750,000
FY 2005	$750,000

PURPOSE **Total**	
FY 2002	$3,238,050.00
FY 2003	$14,627,595.00
FY 2004	$14,127,595.00
FY 2005	$14,127,595.00

While HB2010 has expired the State of Arizona has recently enacted HB2064. This law which takes effect in the 2007 fiscal year provides a significant increase in funding for ELL. Specifically, HB 2064

provides the following appropriations in the current fiscal year:

• Appropriates $10,000,000 in FY 2006-07 from the state General Fund to the ADE for the Statewide Compensatory Instruction Fund.

• Appropriates $2,555,000 in FY 2005-06 and $4,610,000 in FY 2006-07 from the state General Fund to the ADE for statutory duties and *for the costs of providing English language proficiency assessments, scoring and ancillary materials to school districts and charter schools.*

• Appropriates $14,300,000 in FY 2006-07 from the state General Fund to the ADE for distribution to school districts and charter schools for the increased Group B ELL weight.

In addition to the changes in the law, and the significant increases in state funding made available to school districts in Arizona, other resources have also increased dramatically. In Arizona, the Title I program has increased from approximately $120 million in the fiscal year ending June 20, 2000 to $260,348,295 million in the current fiscal year ending June 30, 2007. In addition funding for other programs has also increased dramatically. Overall funding in Arizona, for programs offered under the NCLB act has increased to more than $582,931,537 in fiscal 2007.

The chart attached to this report as exhibit B provides a breakdown of federal funds provided to the State by the Elementary and Secondary Education Act of 1965 between the years of 2002 and 2007 inclusive.

Appendix J

In addition to Title III which is specifically identified to provide services to ELL students, Titles I and II specifically identify ELL students and their teachers as components of the services these Titles support.

In a state such as Arizona where the number of English language learners in some of our largest Title I schools approach and exceed 25% of the population, it is not unreasonable to expect that a significant portion of those English language learner students would require academic assistance and that those schools would include the needs of those students in their consolidated plans required under P. L. 107-110, The No Child Left Behind Act of 2001.

Correspondingly, in a district like Nogales where close to 50% of the students are English language learners, it would not be inappropriate to use a large portion of the NCLB funds to provide strategies that benefit those ELL students.

During same period that Arizona's Title I funds have increased, the Title I allocation for the Nogales Unified School District has increased from $1,849,858 to $2,953,814. Since the fiscal year ending June 30, 2002, NUSD, has carried over at least $250,000, in unused Title I funds each year. For the most recent completed fiscal year ending June 30, 2006, NUSD, has an estimated $525,000, in unused Title I funds. Additionally, current completion reports indicate that NUSD will be carrying over approximately $59,667 in unused Title II Funds and $143,465 in unused Title III funds.

Nogales Unified School District has significant latitude in how it uses the funds made available to it.

NUSD could set aside funds to assist ELLs in a district wide program and allocate Title I funds to each school site for its schoolwide program in accordance with Title I regulations. The decision as to how their Title I funds are used rest with NUSD. In an LEA, like NUSD, with an ELL population approaching 50% of the population it would not be unreasonable to assume their needs would be considered in developing their schoolwide programs.

During the same period NUSD funding under Title III of NCLB has increased from $261,818 in 2003 to an estimated $322,900 in 2007. At the same time the number of ELL students reported by NUSD has decrease from 3923 in 2003 to 2474 in 2007. Accordingly per pupil funding, for Title III, has increased from $67 in 2003 to $121 in 2007. At the same time NUSD funding under the Title I program has gone from $1,644,029 in 2000 to $2,958,814 in 2007. At the same time the ADM of NUSD has decreased from 5989 to 5865. Accordingly per pupil funding for Title I, ignoring carryover of unused funds, has increased from $439 in 2000 to $597 in 2007.

In addition to increases in federal programs and competitive state programs NUSD has experienced significant growth in its equalization formula funding. In the Findings of Fact and Conclusions of Law, issued January 24, 2000, under findings of fact number 19, it was stated that NUSD did not have an override. In fact NUSD has now had an override in place beginning with the 2001 year. The table below shows the amount of the override by fiscal year.

NUSD M&O OVERRIDE

FY 2001	$895,891
FY 2002	$934,373
FY 2003	$947,901
FY 2004	$967,388
FY 2005	$974,800
FY 2006	$1,554,265
FY 2007	$1,674,407

The funds obtained from the M&O override are available for almost any educational purpose which NUSD chooses to apply them to. In addition to receiving additional funds from the override NUSD has received other significant increases in their M&O budget since 2000.

As can be seen from the chart below the M&O budget of NUSD has increased over each of the last eight years while the numbers of students attending NUSD has decreased.

2000	
NUSD M&O BUDGET	$22,195,385
NUSD ADM	6040
AVAILABLE PER PUPIL	$3,675

2001	
NUSD M&O BUDGET	$23,844,487
NUSD ADM	6112

AVAILABLE PER PUPIL	$3,901

2002	
NUSD M&O BUDGET	$24,483,005
NUSD ADM	5935
AVAILABLE PER PUPIL	$4,125

2003	
NUSD M&O BUDGET	$24,704,091
NUSD ADM	5932
AVAILABLE PER PUPIL	$4,165

2004	
NUSD M&O BUDGET	$25,441,166
NUSD ADM	5811
AVAILABLE PER PUPIL	$4,378

2005	
NUSD M&O BUDGET	$25,440,108

Appendix J

NUSD ADM	5806
AVAILABLE PER PUPIL	$4,382

2006	
NUSD M&O BUDGET	$27,006,213
NUSD ADM	5865
AVAILABLE PER PUPIL	$4,605

2007	
NUSD M&O BUDGET	$28,956,359
NUSD ADM	5865
AVAILABLE PER PUPIL	$4,937

The increase in NUSD's M&O budget between 2000 and 2007 is approximately $1,262, or an increase of approximately 34%.

Nogales Unified School District has received significant additional increases in M&O dollars from the classroom site funds made available as a result of Proposition 301. While 60% of the funds are earmarked for salary and benefit increases, 40% of these funds can be used in accordance with A.R.S. § 15-977(H) which includes class size reduction, aims intervention and dropout prevention all issues

affecting ELL students. These dollars are outlined in the table below:

Class Site Funds Per Prop 301	
FY 2002	$1,901,845
FY 2003	$1,703,092
FY 2004	$1,638,480
FY 2005	$1,681,501
FY 2006	$2,452,441
FY 2007	$2,337,050

Nogales like other school districts is also the recipient of other federal, state and local funds that benefit ELL students. For example in 2006, NUSD received $254,853 from the instructional improvement fund. These funds can be used for purposes identified in A.R.S. § 15-979 (D0 & (E) which specify that up to 50% of the funds are to be used for salaries and benefits and the remainder shall be used for 1) dropout prevention programs, and 2) instructional improvement programs including programs to develop minimum reading skills for students by the end of third grade. Both of these programs could benefit ELL students.

Attached to this document as exhibit C is a schedule of all of the grants received by Nogales Unified School District from the Arizona Department of Education for the 2006 fiscal year. The schedule reflects Total Program budgets of $8,916,793 which includes local carryover of $286,532. *Local carryover* reflects funds from a prior year that were paid out to NUSD but not used by them and subsequently were carried forward into the current year. The third column reflects the amounts that were paid out to NUSD in the 2006 fiscal year. The fourth column

Appendix J

Remaining funds are those funds NUSD has not used and which will be carried forward into the next fiscal year. These funds total $1,366,870.

In addition to all of the funds made available through the Arizona Department of Education, NUSD receives significant funds from the School Facilities Board. The chart below shows how much has been received by NUSD:

2001	
Deficiencies Correction	$558,472
Building Renewal	$1,108,661
Totals	$1,667,133

2002	
Deficiencies Correction	$8,198,471
Building Renewal	$444,437
Totals	$8,642,908

2003	
Deficiencies Correction	$6,916,952
Building Renewal	$1,277,380
Totals	$8,194,332

Appendix J

2004	
Deficiencies Correction	$902,976
Building Renewal	-$23,307
Totals	$879,669

2005	
Deficiencies Correction	$27,041
Building Renewal	$729,749
Totals	$756,790

2006	
Deficiencies Correction	$28,455
Building Renewal	$649,270
Totals	$677,725

Total	
Deficiencies Correction	$16,632,367
Building Renewal	$4,186,190

Totals	$20,818,557

This table reflects the fact that since 2001, NUSD has received $20,818,557 in funds designed to improve their facilities. The deficiency correction funds were designed specifically to bring NUSD up to the minimum space requirements for the number of students attending their schools.

In conclusion I can offer the following information. Assuming NUSD spends a proportionate amount of federal and state funds for ELL students, and assuming the full provisions of HB 2064 are allowed to take effect, I estimate the per pupil funding available in 2007 for ELL students attending NUSD schools, exclusive of Basic State Aid, to be $1,432, per ELL student. This amount compares with $711 per ELL student available from these same funds in FY 2000, or an increase of $721 or more than 100%

Additionally, NUSD has significant latitude in using the increasing myriad of state funds it has received to benefit students who are academically in need. The effect of these significant increases in federal and state funding is somewhat evidenced by the fact that NUSD has had significant carryovers of Title I, Title II and Title III funds since the advent of No Child Left Behind. In addition to the federal monies and group B weight increase available to it, NUSD has received increases in the amount of base level funding to which they are entitled. A review of the chart entitled "PER STUDENT FUNDING FOR ELL INCLUDING BASE LEVEL AMOUNT &

TEACHER EXPERIENCE ONLY" shows that the base level funds for ELL students has increased from $2,592 in 2000 to $3,173 in 2007. This is an increase of $581 or 22%.

When all of these factors are considered I can safely affirm that NUSD has the resources required to adequately fund their ELL programs. The issue is not one of sufficient resources but rather a question of how those resources are allocated.

* * *

Appendix J

[EXHIBIT 236]

Fiscal Year	1998
Name	Nogales Unified District
Total Salary	$7,526,802.00
Total FTE	258.2
Average Salary	$29,151.05

Fiscal Year	1999
Name	Nogales Unified District
Total Salary	$9,266,278.00
Total FTE	287.5
Average Salary	$32,230.53

Fiscal Year	2000
Name	Nogales Unified District
Total Salary	$8,453,272.00
Total FTE	272.2
Average Salary	$31,055.37

Appendix J

Fiscal Year	2001
Name	Nogales Unified District
Total Salary	$9,213,762.00
Total FTE	296
Average Salary	$31,127.57

Fiscal Year	2002
Name	Nogales Unified District
Total Salary	$10,536,368.00
Total FTE	329
Average Salary	$32,025.43

Fiscal Year	2003
Name	Nogales Unified District
Total Salary	$10,892,434.00
Total FTE	317
Average Salary	$34,360.99

Fiscal Year	2004

Appendix J

Name	Nogales Unified District
Total Salary	$11,235,276.00
Total FTE	321.5
Average Salary	$34,946.43

Fiscal Year	2005
Name	Nogales Unified District
Total Salary	$11,947,219.00
Total FTE	329.5
Average Salary	$36,258.53

Fiscal Year	2006
Name	Nogales Unified District
Total Salary	$13,606,068.00
Total FTE	331
Average Salary	$41,105.95

* Omitted Columns Entitled OwnerID, CTDS and Classification ID From Table

Appendix J

[EXHIBIT 238]

Irene Moreno

Position:
Deputy Associate Superintendent, Office of English Acquisition Services The Arizona Department of Education

Dates:
April 2003 to Present

Activities:
Under my guidance, the activities of the Office of English Acquisition Services have expanded as follows:

1. **The design, development and implementation of the Arizona English Language Proficiency Standards (ELPS).**

a. <u>These did not exist prior to 2003.</u>

b. This means that there was no central core of instruction to enable teachers to develop a uniform curriculum when the previous four assessments were administered.

• SELP was the first English proficiency assessment explicitly designed and linked to proficiency standards for ELL instruction.

• With these proficiency standards, for the first time, educators could develop a viable, consistent and workable curriculum for ELLs and English acquisition that is correlated to the Arizona Academic Standards. Teachers could now teach to the standards, which again, did not exist prior to this

time. Even though there were different mechanisms for assessment, the introduction of the ELPS brought new dimension and critically-needed resources to the teaching of ELLs. Critically, these standards are also correlated to the Arizona Academic Standards.

c. From the beginning of this project in May of 2003, to final adoption by the Arizona State Board of Education (SBOE) on January 26, 2004, this process revolved around stakeholder participation and incorporated statewide input, as can be seen from the outreach towards communities across Arizona.

d. EAS has produced and disseminated bound copies statewide, provides them at every conference, provides technical training sessions and has incorporated their use into the EAS monitoring process: Teachers are interviewed regarding their integration of the standards into their lesson planning and instruction. (Please note Question 14 Response below)

e. These standards are one of the mandatory rubric items in educator training required to obtain the Structured English Immersion (SEI) Endorsement, which is also outlined in point 3 of this response.

2. **The design, development and implementation of the Structured English Immersion (SEI) Endorsement**

a. <u>This did not exist prior to 2004</u>.

b. The Provisional SEI Endorsement, which requires 15 clock hours of professional development or one semester hour, <u>must</u> be obtained by August 31, 2006.

• The Provisional SEI Endorsement is valid for 3 years and is not renewable R7-2-613, (J), (2). Those classroom teachers, supervisors, principals, and superintendents holding a full English as a Second Language (ESL) Endorsement or a full Bilingual Endorsement do not need to obtain the Provisional SEI Endorsement.

c. The Full SEI Endorsement requires an additional 45 clock hours of professional development or three semester hours, for a total of 60 clock hours of professional development or four (4) semester hours

• The Full SEI Endorsement shall be completed by August 31, 2009, and the Full SEI Endorsement shall be added at the time of renewal. At the time of renewal, a person lacking the requirements for the Full SEI Endorsement shall be denied renewal.

d. In this process, EAS and the Structured English Immersion (SEI) Task Force members developed the SEI 15 and 45 Clock Hour provisions of the SEI Endorsement. The task force's makeup reflected statewide outreach, as well as members from the K-12 and postsecondary educational communities.

e. The United States District Court ruled in favor of the Arizona State Board of Education on a challenge regarding the SEI Endorsement rules.

f. An SEI curricular framework for training was designed and developed by the aforementioned Task Force. The SBOE approved the SEI Task Force-recommended curricular framework for both the Provisional SEI Endorsement and the Full SEI Endorsement on January 24, 2005. In addition, the

SEI Endorsement fund its necessary component, the ELPS) are now part of the Teacher Preparatory Programs at all Arizona Institutes of Higher Learning.

g. A statewide SEI Reimbursement Fund was established to provide $13,500,000 for educators to receive SEI endorsement training. This fund provides all districts and charter schools money, up to a maximum of $115.00 per educator, to train all certified personnel.

3. **The design and development of the Structured English Immersion (SEI) Models:**

a. These did not exist prior to 2003.

b. In order to provide guidance to educators and practical examples/advice to help them in development of a district's SEI program, the design and development of the SEI Program Models was undertaken. This process was overseen by EAS in partnership with the SEI Advisory Council. *See* **Exhibit # 37, *SEI Advisory Council***

c. The educational literature that was used to assist with the creation of the SEI program models is The ABC's of English Immersion: A Teacher's Guide. This publication comes from the Center for Equal Opportunity in Sterling, Virginia. The SEI program model document was then mailed to all LEAs for additional comment/input as well as being shared at the monthly PELL meeting. EAS also canvassed stakeholder input from across the state in order to review and revise the SEI program models, if necessary.

d. These models are programmatic guidance (as opposed to a mandate) and are based on ARS §15-

751 to 15-755 (Article 3.1) which explains what structured English immersion instruction entails. The SEI models were finalized and broadcast within the state of Arizona on August 12, 2005 and subsequently placed on the ADE website.

e. The makeup of an ideal SEI classroom example (into which a student in the ELL program would be placed) is as follows:

• In the SEI classroom, students are grouped based on their proficiency level on the SELP.

• The ELL proficiency standards are used to guide instruction in the SEI classroom. Since the ELL proficiency standards are linked and aligned to the Arizona Academic Standards, this will ensure that students have access to the curriculum, therefore, attaining academic excellence.

• This program placement is not normally intended to exceed one year as students in the SEI classroom will receive intensive English Language Development through the content areas.

f. The makeup of an ideal mainstream classroom example (into which a reclassified/FEP student would be placed) is as follows:

• Students are placed with native English speakers and other fluent English proficient speakers.

• The Arizona Academic Standards are used to guide instruction (and the ELPS may also be incorporated into lessons).

• Teachers in mainstream classrooms continue to utilize SEI strategies in order to make the curriculum comprehensible.

• This allows for continued English Language Acquisition through the content areas.

4. **The development and the collaboration of the Arizona Department of Education (ADE) in two Structured English Immersion (SEI) Training Partnerships provide statewide SEI educator training.** The partners are The Arizona School Services through Educational Technology (ASSET) and the Arizona K-12 Center (AzK-12). The ASSET partnership offers educators online individual SEI Endorsement training. The AzK-12 partnership offers a "train-the-trainer" system in which district teams receive online and face-to-face SEI Endorsement training. Both systems lead to the official SEI certification for participants.

a. These collaborative ventures and concentrated outreach did not exist before 2005.

b. Providers of SEI training must ensure that their curricular framework and training comply with all aspects of a rubric, also developed by EAS and the SEI Task Force.

c. With both the ASSET and AzK-12 training systems, the educators and educator-teams are from every corner of the state. They are from diverse districts/schools, from locations in major urban centers and rural settings, and are themselves from diverse demographic backgrounds, and these educators will reach diverse student populations with research-based strategies/data-assessment guided instruction.

d. Both partnerships have developed a consultation relationship to develop their curriculum, with Dr. Jana Echevarria, who has also

been a long-time speaker at EAS conferences and is a State Board of Education-approved SEI trainer. She has written numerous journal articles and book chapters, has written and produced two videotapes and has co-authored two books, *Sheltered Content Instruction: Teaching Students with Diverse Abilities*, and *Making Content Comprehensible for English Language Learners: The SIOP Model (see below noted exhibit)*, both published by Allyn & Bacon. Dr. Echevarria is currently a Principal Investigator with OERI's Center for Research on Excellence, Education and Diversity (CREDE) where she is conducting a five year study on the Effects of Sheltered Instruction on the Achievement of Limited English Proficient Students.

e. These partnerships with both ASSET and the Arizona K-12 Center offer a linkage between higher education and ADE to develop and provide training to benefit educators across the state. The development of both plans required reflective thinking in the identification of need, the scope of work, the development of training modules and the delivery systems. Both required a long time in analyzing the potentialities and challenges. By using combined resources, these partnerships have a statewide effect that is much greater than the sum of its parts. Both partnerships are ground-breaking. This is statewide-outreach into educator credentialing and right into the classroom.

• The Arizona K-12 Center (AzK-12) is the professional development arm of Northern Arizona University, located in Phoenix, Arizona.

Appendix J

• The Arizona state Legislature approved and funded the Arizona K-12 Center to begin in July 1999. In its first year, the Center expanded through a collaborative effort among Arizona's universities and other state and national learning institutions. Now in its fourth year, AzK-12 continues to bring innovative ideas and professional development support to Arizona educators.

• Az-K12 has developed a statewide train-the-trainer model (5-member teams) that supports LEAs in training district teachers and administrators in SEI. The past training has covered the Provisional 15-Clock Hour SEI Endorsement. The current and projected train-the-trainer modules will cover the remaining 45-Clock Hour requirement for the SEI Endorsement. As of this date, 300 educators (60 teams) from across Arizona have already received training.

• ASSET is the online professional development arm of Arizona State University, located in Tempe, Arizona. ASSET has helped Arizona K-12 educators integrate technology into their classrooms since 1983. ASSET is a self-supported department of KAET Public Television located at Arizona State University. This organization is supported by a school membership structure, as well as grants, and corporate donations. ASSET takes great pride in collaborating with business and non-profit organizations to bring the best possible resources to Arizona educators.

• ASSET has developed online SEI training for individuals. As of this date, this training has reached over 1,500 educators from across Arizona. Current

and projected training will cover the remaining 45-Clock Hour requirement for the SEI Endorsement.

5. **NCLB requirements regarding accountability and English Language Learner (ELL) instruction, and data reporting.** The NCLB Annual Measurable Achievement Objective (AMAO) requiring reporting of, "...annual increases in the number or percentage of children attaining English proficiency by the end of each school year as determined by a valid and reliable assessment of English proficiency..." has also had a positive impact upon the reporting of reclassified students by LEAs. Due to NCLB requirements, data and the processes for acquiring the same needed to be precise, accurate and quantifiable. This was not the case due to a number of factors:

a. Prior to 2003 and the development of the Arizona state English Language Proficiency Standards, Local Educational Agencies (LEAs) used multiple and inconsistent performance indicators from the assessment instruments to measure student progress in English. A common set of standards, benchmarks, and performance indicators for the state's schools did not exist.

b. Prior to 2003, ADE attempted to correlate results to meet the required reporting guidelines for NCLB, using LEAs' self-reported data. This was a daunting task, considering that the LEAs had the option to use any of the four State Board of Education-approved assessment instruments.

c. Prior to 2003, there was no one state system for districts to use in reporting data. This was

changed with the establishment, by law, of the Student Accountability Information System (SAIS).

d. The following delineates the parameters of the Student Accountability Information System under Arizona Revised Statutes, Title 15.

15-1041. Student accountability information system.

The student accountability information system is established to enable school districts and charter schools. to transmit student level data and school finance data electronically through the internet to the department of education for the purposes of complying with the statutory obligations of the department of education and the state board of education.

e. With the adoption of the Stanford English Language Proficiency (SELP) Assessment and the implementation of the SAIS, the state of Arizona now is able to comply with federal requirements and provide consistent, clean, coherent data that reflects a true picture of LEAs' ELL programs and reclassified students.

f. ADE also designed, developed and has posted in the English Acquisition Services (EAS) web page a manual to assist districts in the understanding of AMAOs. The manual provides step-by-step instruction in what AMAOs are, how the ADE calculates a district's ranking based on district-generated data, how districts can appeal findings and other items of technical assistance.

6. **The development and implementation of the Practitioners of English Language Learners (PELL) monthly meetings.**

a. These did not exist prior to 2004.

b. This organization and these meetings were developed and implemented by EAS to ensure an unbroken line of communication and offer technical assistance to ELL coordinators across Arizona. Subject matters range from data input into the Arizona Student Accountability Information System (SAIS), school finance funding cycles to SELP.

7. **The design, development and implementation of the annual Arizona Department of Education (ADE) Structured English Immersion (SEI) Seminars:**

a These did not exist prior to 2003.

b. These were designed and implemented by ADE to be vehicles for ELL educator professional development that encompass presentations by nationally-recognized experts, research-based teaching strategies, data, EAS-provided technical assistance information sessions and materials/resources for ELL instruction.

c. The first event, "The SEI Super Seminar." was held on May 31, 2003, the second event, "English Immersion Strategies for the Education Professional," was held on May 19-20, 2004 and the third event, "Standards, Strategies, Assessment: Improving Academic Achievement," was held on May 25-27, 2005.

• At this last noted event, attendance at certain specifically-listed sessions adhered to the SEI curriculum and could be part of the actual total clock hours necessary to acquire an Provisional SEI endorsement.

d. The fourth event, "Standards, Strategies, Assessment: Improving Academic Achievement-Part II," was held August 31, September 1-2, 2005; this meant two conferences were held in 2005.

• This event's total design (17 hours in total) provided actual clock hours necessary to acquire an SEI endorsement.

e. Following are excerpts from large program files for the events. The exhibits are of the excerpted 'conference-at-a-glance' files that were inserted into the program.

f. Also, the two conferences for 2006 are:

• The upcoming "ELL Leadership Summit-2006" to be held May 16, 17, 2006 is designed for Arizona school district superintendents, assistant superintendents, principals, assistant principals and teacher leaders. It will focus on data acquisition and practical real-world data used to guide ELL instruction.

• The upcoming (Title TBD) to be held August 14-16,2006 event's total design (17 hours in length) is to provide actual clock hours necessary to acquire an SEI endorsement.

8. **The design, development and implementation of the EAS "Teacher of the Year" Award:**

a. This did not exist prior to 2005.

b. This award has been created to recognize excellent education in the challenging field of ELL instruction; EAS designed, developed and implemented the first annual "EAS-Teacher of the Year" honor. Educators have to complete a challenging application and acquire testimonials

attesting to their expertise. In a blind judging, based upon the rubric, a panel of the ADE Deputy Superintendent, independent consultants and current ELL practitioners select the award recipient. In 2005, 50 teachers statewide applied for this award.

* * *

Appendix K

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MIRIAM FLORES, et al., Plaintiffs, vs. STATE OF ARIZONA; et al., Defendants.	Docket No. CV92-596 TUC-RCC Tucson, Arizona January 12, 2007 10:15 a.m.

[COOPER, T-4, 92:6-92:15]

Excerpt from Testimony of Kelt Cooper

* * *

p. 92

. . .

Q. Now, at the -- I guess toward the end of your testimony you talked about the role of leadership and management in a school district and that it doesn't do any good to pour money into a poorly managed school district with poor leadership; right?

A. Correct.

Q. You do agree, though, that money can make a difference with effective leadership and good management; right?

A. Yes, sir.

* * *

Appendix K

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MIRIAM FLORES, et al., Plaintiffs, vs. STATE OF ARIZONA; et al., Defendants.	Docket No. CV92-596 TUC-RCC Tucson, Arizona January 24, 2007 9:59 a.m.

[DUDO, T-7, 117:4-120:3]

Excerpt from Testimony of Eugene E. Dudo

* * *

p. 117

. . .

Q. Right. Now let's talk about where the district gets the money to do this. The district, like every other district in Arizona, receives state equalization aide; correct?

A. That's correct.

Q. And as part of that you get the group B weight that we've talked about for quite a while here?

A. Yes, that's correct.

Q. Is that sufficient to pay for this program?

A. No.

Q. That's the $365 per English language learner student?

A. That's correct.

Q. And we'll get in a moment to the financial figures for this program, but where does the district get the balance of the money it needs to fund this program?

A. Most of the money that the district uses to fund the program comes directly from our deseg funding, which is a local tax rate assessed on property within the district.

Q. And the -- let me -- let's make sure we're

p. 118

clear about this. The district is authorized under state law to assess a tax to pay for compliance OCR agreements; correct?

A. That's correct.

Q. Glendale, however, also has either an OCR agreement, or it's an OCR agreement I believe that has racial aspects as well; is that correct?

A. That's correct.

Q. Can you tell us about that a bit?

A. Well, it's similar where a complaint had been filed with the Office of Civil Rights, and based upon their review of our district they identified some areas that they wanted the district to change, and so we are allowed to budget those costs outside budget limit on that tax rate.

Q. Okay. That doesn't require a vote from property holders or voters within the district, does it?

A. No, it does not.

Q. That's just by a vote of the governing board; correct?

A. That is correct.

Q. And just give us a ballpark on this, but how much money does the district generate through this tax for its ELL programs?

p. 119

A. About 3 and a half million dollars, I believe, for -- that we associate with the ELL agreements.

Q. We'll get the specific in a second. And how much for the racial aspects?

A. Another 2 million.

Q. So for --

A. Two, 2 -- about 2, yeah, about 2 million.

Q. So the district generates over $5 million for compliance with OCR agreements?

A. Yes. Yeah.

Q. Through the local property tax base; correct?

A. That's correct.

Q. With no contribution from the state for those purposes; right?

A. That's been kind of an issue with deseg programs. Our program I don't think generates any state revenues. Some deseg programs may because of caps on tax rates that occur, but ours doesn't.

Q. What I was trying to get at was the state doesn't give you any equalization assistance or anything like that because of deseg monies that are produced by local taxpayers?

A. No, it doesn't.

Q. Okay. Now, how would you characterize the

p. 120

success of Glendale's programs for its ELL students?

A. I would say that our district program is

successful.

* * *

[DUDO, T-7, 125:10-125:24]

Excerpt from Testimony of Eugene E. Dudo

* * *

p. 125

. . .

Q. Glendale's proud of its success in this area, I assume?

A. That's correct.

Q. Now, after this newspaper article -- well, before we leave it let's go to the last page for a second. You're quoted in the last -- very last column of that article. It says, "Other school districts cannot duplicate the story without an adequate funding base"?

A. Yes.

Q. And you made that statement; correct?

A. That is correct.

Q. I assume you believe it; right?

A. Yes, I do.

* * *

Appendix K

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MIRIAM FLORES, et al., Plaintiffs, vs. STATE OF ARIZONA; et al., Defendants.	Docket No. CV92-596 TUC-RCC Tucson, Arizona January 11, 2007 10:00 a.m.

[MORENO, T-3, 19:4-19:11]

Excerpt from Testimony of Irene Moreno

* * *

p. 19

. . .

Q. Based on what you see here, is this a cause for concern as the head of that division?

A. Yes.

Q. Okay. Do you have any explanation as you're sitting there about why scores declined at every grade level that we have data for?

A. No. I mean, there's theories, but I don't have anything --

* * *

Appendix K

[MORENO, T-3, 30:5-30:22]

Excerpt from Testimony of Irene Moreno

* * *

p. 30

. . .

Q. Okay. So we've got -- since the judgment was issued in this case we've gone through three different ways of assessing the proficiency of English language learners; correct?

A. That is correct.

Q. Now, when the SELP test was introduced and started to begin to be used -- in '04-05?

A. Yes, sir.

Q. -- what was the impact on the classification rate of English language learners?

A. It increased.

Q. By how much? Do you know?

A. We have various data that has come in. There were a handful of districts, maybe more than a handful, that claimed there was a real spike, but as we had our research and evaluation person look at it, it did not concur with the districts and what they saw.

* * *

Appendix K

[MORENO, T-3, 72:4-72:25]

Excerpt from Testimony of Irene Moreno

* * *

p. 72

. . .

Q. And then for English language learners, we've got three different ways that we've been assessing those students over the last six years; right?

A. Yes.

Q. We've talked about them, I don't want to beat a dead horse here, but we've actually changed the way we determine how English language learners are proficient three different times over the last six years?

A. Okay, yes.

Q. Is that correct?

A. Yes.

Q. So just as a general matter, I mean, is it really possible to compare this year's data to last year's data to the previous year's data, going back all the way to, say, 2003 for English language learners? I mean, is it apples to apples? Do you understand my question?

A. I understand the question, and I agree it isn't apples to apples. You have to have a baseline using the same assessment to be able to see where actual growth is.

* * *

Appendix K

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MIRIAM FLORES, et al., Plaintiffs, vs. STATE OF ARIZONA; et al., Defendants.	Docket No. CV92-596 TUC-RCC Tucson, Arizona January 18, 2007 9:52 a.m.

[ZAMUDIO, T-6, 52:11-52:20]

Excerpt from Testimony of Guillermo V. Zamudio

* * *

p. 52

. . .

Q. And do you think that accounts in part for, for example, the rankings that Ms. Garcia-Dugan testified about? The Nogales High School was in the 500s I believe on that list. I assume that's not a result you're happy with?

A. Certainly that is not a result we're happy with, and we believe that because of that the high school -- and that's one of the factors that helps to identify why we're not doing as well. We obviously would want to be doing better.

* * *

Appendix L

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MIRIAM FLORES, individually and as parent of Miriam Flores, a minor child, et al., Plaintiffs, v. STATE OF ARIZONA; et al., Defendants.	No. CIV 92-596-TUC-ACM **ORDER**

Pending before the Court is Plaintiffs' Third Motion for Injunctive Relief and Motion to Expedite filed December 13, 2004. The Court heard oral argument on January 24, 2005. After consideration, the Court will grant Plaintiffs' Motions.

FACTUAL AND PROCEDURAL BACKGROUND

On January 24, 2000, the Honorable Alfredo Marquez entered his ruling on this case when he found that Defendants violated the Equal Education Act of 1974 (EEOA) by failing to adequately fund instruction for children who are English language

learners (ELLs)[1]. Plaintiffs filed a Motion for Post-Judgment Relief on July 13, 2000 asking the Court to order

Defendants to complete a new cost study by November 1, 2000 which was granted on October 12, 2000. The Court's Order made it clear that the study was to be completed in a timely fashion so that the Arizona legislature could appropriate funding and take action during the next budget session beginning in January 2001. In November 2000, Arizona voters passed Proposition 203 which repealed the Arizona statutes prescribing the models for the delivery of language acquisition programs and established a new model based on sheltered English or structured English immersion. In response to Proposition 203, the parties entered into a stipulation on November 28, 2000 which provides that the State of Arizona will determine the training, background and qualifications necessary for teachers of ELL students and adopt appropriate rules. Further, the State agreed that the cost study that was to be prepared pursuant to the Court's October 12, 2000 Order would reflect the funding and resources necessary to train and develop teachers of ELL students under the Proposition.

---

[1] Originally, these particular students were referred to as limited English proficient (LEP) and the program of instruction was referred to as "Lau programs" after the Supreme Court case, *Lau v. Nichols*, 414 U.S. 563 (1974).

The cost study was completed; however, the legislature did not consider funding the programs and Plaintiffs sought further post-judgment relief by filing a Motion for Injunctive Relief on May 22, 2001 asking the Court to set a deadline for the State to comply with the January 2000 Declaratory Judgment. The Court granted the Motion on June 11, 2001 ordering the State to comply by January 31, 2002. The state legislature enacted HB2010 on December 19, 2001 which provided an interim measure to satisfy the Court's Order to change the way ELL programs are funded. HB2010 provided funding of an additional $150 per ELL student raising the formula to approximately $339.91 per ELL student (based on the amount that the Nogales Unified School District was incurring as reported in the 2001 cost study). The bill also required the Legislative Council to award the contract for a new cost study to a private entity and this study was to be completed and submitted to the Joint Legislative Committee, the Governor, the President of the Senate and the Speaker of the House of Representatives on or before August 1, 2004. Further, the bill established the Joint Legislative Committee on School Maintenance and Operations Funding which consists of four members from the House of Representatives and four members from the State Senate. Among other things, the Committee was to evaluate and make specific recommendations on school district funding and ELL programs. On January 9, 2002, Plaintiff filed for an injunction challenging the legislation as not bearing a rational relationship to the actual funding actually needed to

implement language acquisition programs in Arizona. The Court granted that Motion on April 8, 2002, but reconsidered and vacated the Order on April 30, 2002. On June 12, 2002, the Court issued an Order finding that the State took appropriate action to address the directives in the case in part because the legislature recognized that the funding levels may require further adjustment once the new cost study was completed. Defendants filed the new cost study on October 11, 2002.

The cost study has not been completed, missing the August deadline set by HB2010. Also, the Joint Legislative Committee was set to automatically expire on December 31, 2004. Plaintiffs filed this Third Motion for Injunctive Relief on December 13, 2004 asking that the Court set a deadline for the State to comply with the January 2000 judgment.

LEGAL STANDARD

The granting or denying of injunctive relief rests within the sound discretion of the trial court. *See S.E.C. v. Goldfield Deep Mines Co. of Nevada*, 758 F.2d 459 (9th Cir. 1985); *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001 (9th Cir. 1985); and *G.C. and K.B. Investments, Inc. v. Wilson*, 326 F.3d 1096 (9th Cir. 2003). "Courts have inherent power to enforce compliance with their lawful orders...." *Shillitani v. United States*, 384 U.S. 364, 370 (1966). "When a district court's order is necessary to remedy past discrimination, the court has an additional basis for the exercise of broad

equitable powers." *Spallone v. United States*, 493 U.S. 265, 276 (1990). These powers are not unlimited however and the court should use the "least possible power adequate to the end proposed." *Id.* The requirements for injunctive relief are 1) the likelihood of substantial and immediate irreparable injury, and 2) the inadequacy of remedies at law. *G.C and K.B. Investments, Inc.*, 326 F.3d at 1107. *See also LaDuke v, Nelson*, 762 F.2d 1318, 1330 (9th Cir. 1985). The scope of federal injunctive relief against a state government must always be narrowly tailored to enforce federal constitutional and statutory law only. *Clark v. Coye*, 60 F.3d 600, 603-604 (9th Cir. 1995). Thus, the injunction should protect the plaintiffs' federal constitutional and statutory rights but not require more of state officials than is necessary to assure their compliance with federal law. *Id.* at 604.

DISCUSSION AND ANALYSIS

Plaintiffs file this Motion because certain, sections of HB2010 expired on December 31, 2004 and they fear that the legislature will do nothing for ELL programs during this legislative session. Plaintiffs point out that the cost study that was supposed to be completed and submitted by August 1, 2004 has not been done; however, Defendants have supplemented the record with a letter that indicates it may be done by February 15, 2005. Plaintiffs argue that the absence of a final cost study and the end of the Joint Legislative Committee makes it a concern that the legislature will not act on its obligations to fund ELL

programs during this session and the Plaintiffs would have to wait another year for any relief. Plaintiffs ask the Court to establish a deadline for the legislature to comply with the Judgment already issued in this case.

Defendants counter that an injunction would be premature and the Court should defer its ruling on the Motion until the legislature has had an opportunity to act on its own. Defendants admit that the cost study has not been completed and that the Joint Committee has not submitted a report. However, Defendants contend that the work on the cost study continues and that Governor Napolitano had written to the President of the Senate and the Speaker of the House on December 6, 2004 urging them to reconstitute the Joint Committee. Defendants argue that the legislature is well aware of the problem and that the bill [HB2010] itself contemplated that a report by the Joint Committee would not be available for action by the Legislature until the 2005 session. Defendants ask that the Court give the new Legislature an opportunity to take further action on its own.

Plaintiffs reply that Defendants failed to provide any explanation for its delay and allege that they are in no hurry to comply with the Court's Order. Plaintiffs argue that the Governor's request that the Joint Committee be reconstituted has no legal effect and that the legislature can disregard it. In a letter to the Court dated January 21, 2005, the President of the Senate and the Speaker of the House stated that

they intended legislative review during this session. Further, the Joint Committee was automatically repealed at the end of December and it would take new legislation to reconstitute it. Plaintiffs argue that this is not the first time in the history of this case that the legislature has failed to discharge its responsibilities and that a Court order establishing a deadline to comply is the least restrictive remedy possible at this point.

The Court is mindful of the issues that have been perculating in this case for the past five years. Thus far, the legislature has failed to meet the Court's deadlines as well as their own. If the Court were to defer its ruling to see if the legislature acts on its own, it may jeopardize any opportunity for the ELL programs to be funded during this legislative session and the children will have to wait more than another year for any type of relief. Further, the Court finds no harm in setting a deadline to ensure that the legislature acts when it has already expressed an intent to do so. By ordering injunctive relief, the Court seeks to ensure that Plaintiffs receive the relief they were found to be entitled to more than five years ago while not putting any more requirements on the State than is absolutely necessary. For these reasons, the Court will grant Plaintiffs' Motion and order that the legislature comply with the Court's January 2000 Declaratory Judgment by the end of this legislative session.

Accordingly,

IT IS HEREBY ORDERED that Plaintiffs' Third Motion for Injunctive Relief is (Docket No. 284) **GRANTED**. Defendants have until the end of this legislative session or April 30, 2005 (whichever date is later) to comply with the Court's January 2000 Order by appropriately and constitutionally funding the state's ELL programs taking into account the Court's previous orders and the parties' stipulation.

IT IS ALSO ORDERED that Plaintiffs' Motion to Expedite (Docket No. 283) and Defendants' Motion to Supplement are **GRANTED**.

DATED this 24th day of January, 2005.

/s/ RANER C. COLLINS
RANER C. COLLINS
United States District Judge

PETITIONER'S BRIEF

122

(9) (10)

Supreme Court, U.S.
FILED
FEB 19 2009
OFFICE OF THE CLERK

No. 08-294
(consolidated with No. 08-289)

In the
Supreme Court of the United States

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES and PRESIDENT OF THE ARIZONA SENATE,

PETITIONERS,

v.

MIRIAM FLORES, individually and as parent of Miriam Flores, minor child; ROSA RZESLAWSKI, individually and as parent of Mario Rzeslawski, minor child; STATE OF ARIZONA and the ARIZONA STATE BOARD OF EDUCATION, and its members in their official capacities,

RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

RICK RICHMOND
CHRISTOPHER C. CHIOU
STEVEN A. HASKINS
KYLE T. CUTTS
KIRKLAND & ELLIS LLP
777 South Figueroa Street
Los Angeles, CA 90017
(213) 680-8400

DAVID J. CANTELME
D. AARON BROWN
PAUL R. NEIL
CANTELME & BROWN, PLC
3030 N. Central Avenue
Phoenix, AZ 85012
(602) 200-0104

KENNETH W. STARR
Counsel of Record
KIRKLAND & ELLIS LLP
777 South Figueroa Street
Los Angeles, CA 90017
(213) 680-8400

ASHLEY C. PARRISH
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Counsel for Petitioners

February 19, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TC + TA

4CC 524

753 A

131

QUESTIONS PRESENTED

In 2000, a federal district court held that Arizona violated the Equal Educational Opportunity Act ("EEOA") because it was not adequately funding programs for teaching English to students. Since then, Arizona has implemented enormous funding increases and complied with the comprehensive federal requirements for English-language instruction under the No Child Left Behind Act ("NCLB"). The district court has nonetheless refused to modify its eight-year-old injunction, imposing multi-million-dollar penalties on the State until the Arizona Legislature further (and substantially) increases funding. Applying a standard that conflicts with decisions of this Court and the other courts of appeals, the Ninth Circuit affirmed, holding that petitioners were not entitled to relief because (i) the named defendants support the injunction, and (ii) the injunction's "basic premises" have not been "swept away."

The questions presented are:

1. Whether a federal-court injunction seeking to compel institutional reform should be modified in the public interest when the original judgment could not have been issued on the state of facts and law that now exist, even if the named defendants support the injunction.

2. Whether compliance with NCLB's extensive requirements for English-language instruction is sufficient to satisfy the EEOA's mandate that States take "appropriate action" to overcome language barriers impeding students' access to equal educational opportunities.

PARTIES TO THE PROCEEDING

Petitioners, who were appellants in the court of appeals, are (i) the Speaker of the Arizona House of Representatives; and (ii) the President of the Arizona Senate.

Respondents, who were appellees in the court of appeals, are (i) Miriam Flores, individually and as a parent of Miriam Flores, minor child; (ii) Rosa Rzeslawski, individually and as a parent of Mario Rzeslawski, minor child; (ii) the State of Arizona; and (iv) the Arizona State Board of Education and its individual members in their official capacities.

Thomas C. Horne, Superintendent of Public Instruction, was an appellant in the court of appeals, and is the petitioner in the related, consolidated case, *Horne v. Flores*, Case No. 08-289.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF AUTHORITIES vi
INTRODUCTION 1
OPINIONS BELOW 3
JURISDICTION 3
STATUTES AND REGULATIONS 4
STATEMENT OF THE CASE 5
A. The Statutory Framework 5
1. The Equal Educational Opportunity Act 5
2. Changes In Educational Theory 7
3. The No Child Left Behind Act 11
B. The District Court Proceedings 16
1. The 1992 Lawsuit 17
2. Arizona's ELL Programs 19
3. The Legislature's Intervention 24
4. The Order On Remand 26
C. The Ninth Circuit's Decision Following Remand 28
SUMMARY OF ARGUMENT 31
ARGUMENT 33
I. The Ninth Circuit Misapplied The Rule 60(b) Standard. 33

A. Rule 60(b) Requires A "Flexible" Standard In The Context Of Institutional Reform Litigation. 33

B. The Ninth Circuit's Decision Violates This Court's Precedents. 36

1. The Ninth Circuit Applied The Wrong Standard. 37

2. The Ninth Circuit Focused On The Wrong Considerations. 38

3. The Ninth Circuit Employed The Wrong Legal Baseline. 41

C. Arizona Has Satisfied The "Flexible" Standard Under Rule 60(b). 44

1. Changes In Fact Require Reassessing The Injunction. 44

2. Changes In Law Require Reassessing The Injunction. 50

II. Congressionally Mandated Requirements For ELL Instruction Set A Benchmark For "Appropriate Action" Under The EEOA. 51

A. Statutes Addressing The Same Subject Matter Should Be Interpreted In Harmony 51

1. Complying With NCLB's Detailed Requirements Is "Appropriate." 52

2. Courts May Not Grant Remedies Under The EEOA That Conflict With Congressional Policies 55

B. The Ninth Circuit's Approach Cannot Be Squared With Applicable Statutory Requirements 57

C. The Ninth Circuit's Approach Contravenes Congress's Policy Judgments. 61

III. The Court Should Direct The Restoration Of Local Control Over Arizona's Schools. 64

CONCLUSION 67

TABLE OF AUTHORITIES

Page(s)

Cases

Agostini v. Felton,
521 U.S. 203 (1997) 35

Alexander v. Britt,
89 F.3d 194 (4th Cir. 1996) 36

Board of Educ. of Oklahoma City Pub. Sch. v. Dowell,
498 U.S. 237 (1991) 34, 35, 38, 43, 50, 65

Bronx Household of Faith v. Board of Educ. of City of New York,
331 F.3d 342 (2d Cir. 2002).....34

Buckman Co. v. Plaintiffs' Legal Committee,
531 U.S. 341 (2001) 54

Building & Constr. for Trades Council of Philadelphia and Vicinity, AFL-CIO v. NLRB,
64 F.3d 880 (3d Cir. 1995).....36

Castaneda v. Pickard,
648 F.2d 989 (5th Cir. 1981) .....6, 7, 43, 48, 49, ... 52, 53, 59, 62

Clinton v. City of New York,
524 U.S. 417 (1998) 39, 40

Coleman v. Miller,
307 U.S. 433 (1939) 41

David B. v. McDonald,
116 F.3d 1146 (7th Cir. 1997) 50

Dayton Bd. of Educ. v. Brinkman,
433 U.S. 406 (1977) 33, 65

Doe v. Chao,
540 U.S. 614 (2004) 52

Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.,
541 U.S. 246 (2004) 52, 58

Erlenbaugh v. United States,
409 U.S. 239 (1972) 54

Evans v. City of Chicago,
10 F.3d 474 (7th Cir. 1993) 36, 39, 41, 43

FDA v. Brown & Williamson Tobacco,
529 U.S. 120 (2000) 54

Ferrell v. HUD,
186 F.3d 805 (7th Cir. 1999) 50

Frew v. Hawkins,
540 U.S. 431 (2004) 35, 38, 39, 43, 51

Hinck v. United States,
127 S. Ct. 2011 (2007) 53

Humble Oil & Refining Co. v. American Oil Co.,
405 F.2d 805 (8th Cir. 1969) 38

In re Detroit Dealers Ass'n,
84 F.3d 787 (6th Cir. 1996) 36

Jenkins v. Missouri,
639 F. Supp. 19 (W.D. Mo. 1985) 10

Kokoszka v. Belford,
417 U.S. 642 (1974) 52

League of United Latin Am. Citizens v. Clements,
999 F.2d 831 (5th Cir. 1993) 39, 40

Local 93, Int'l Ass'n v. City of Cleveland,
478 U.S. 501 (1986) 41

Lopez v. Gonzales,
549 U.S. 47 (2006) 53

Marchie Tiger v. Western Inv. Co.,
221 U.S. 286 (1911) 54

Martin v. Wilks,
490 U.S. 755 (1989) 41

Milliken v. Bradley,
418 U.S. 717 (1974) 66

Missouri v. Jenkins,
515 U.S. 70 (1995) 10, 47, 62, 64, 65

Morales v. Trans World Airlines, Inc.,
504 U.S. 374 (1992) 53

Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish County,
128 S. Ct. 2733 (2008) 65

Morgan v. Kerrigan,
530 F.2d 401 (1st Cir. 1976) 55, 56

New York State Ass'n for Retarded Children, Inc. v. Carey,
706 F.2d 956 (2d Cir. 1983) 45

New York v. United States,
505 U.S. 144 (1992) 40

O'Sullivan v. City of Chicago,
396 F.3d 843 (7th Cir. 2005) 36

Patsy v. Board of Regents,
457 U.S. 496 (1982) 61

Rodriguez v. United States,
480 U.S. 522 (1987) 61

Rufo v. Inmates of Suffolk County Jail,
502 U.S. 367 (1992) 31, 34, 38, 39, 44, 50

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta,
128 S. Ct. 761 (2008) 55

System Fed'n No. 91, Ry. Employees' Dep't v. Wright,
364 U.S. 642 (1961) 34, 51

Thigpen v. Roberts,
468 U.S. 27 (1984) 65

United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc.,
508 U.S. 439 (1993) 52

United States v. Estate of Romani,
523 U.S. 517 (1997) 60

United States v. Fausto,
484 U.S. 439 (1988) 32, 54, 60

United States v. Miami,
2 F.3d 1497 (11th Cir. 1993) 40

United States v. Swift & Co.,
286 U.S. 106 (1932) 37, 38, 39

Verizon Commn'cs Inc. v. Trinko,
540 U.S. 398 (2004) 54

Virginia Bankshares, Inc. v. Sandberg,
501 U.S. 1083 (1991) 55

Wachovia Bank v. Schmidt,
546 U.S. 303 (2006) 32, 54

Statutes and Rules

20 U.S.C. § 1234.....15, 16
20 U.S.C. § 1701.....5, 58
20 U.S.C. § 1703.....44, 57, 58, 59, 60
20 U.S.C. § 1706.....6
20 U.S.C. § 1712.....6, 28, 44, 56, 60, 65
20 U.S.C. § 1713.....6, 56
20 U.S.C. § 1758.....56, 59
20 U.S.C. § 6301.....12
20 U.S.C. § 6311.....12, 13, 14, 15, 16
20 U.S.C. § 6316.....15
20 U.S.C. § 6812.....13, 14, 53, 57, 59, 62
20 U.S.C. § 6823.....53, 57
20 U.S.C. § 6826.....57
20 U.S.C. § 6840.....14
20 U.S.C. § 6841.....14
20 U.S.C. § 6842.....14, 15
20 U.S.C. § 6845.....13
20 U.S.C. § 7844(3).....16
34 C.F.R. § 299.10.....16
34 C.F.R. § 299.11.....16
A.R.S. § 15-754.....19
A.R.S. § 15-756.06.....21
A.R.S. § 15-756.08.....20
Pub. L. No. 107-110 (Jan 8, 2002).....5

Pub. L. No. 93-380 (Aug. 21, 1974) 5

R7-2-805.C-F 16

Other Authorities

147 Cong. Rec. S. 13,365, 13,385
Statement of Sen. McCain (Dec. 18, 2001).....13

Burtless, Gary.
Introduction and Summary, in DOES MONEY MATTER? THE EFFECT OF SCHOOL RESOURCES ON STUDENT ACHIEVEMENT AND ADULT SUCCESS (Gary Burtless, ed. 1996) 9

Ciotti, Paul.
Money and School Performance, in SCHOOL REFORM: THE CRITICAL ISSUES (Williamson M. Evers, *et al.* eds., 2001).....11

Evers, Williamson M. & Paul Clopton.
High-Spending, Low-Performing School Districts, in COURTING FAILURE: HOW SCHOOL FINANCE LAWSUITS EXPLOIT JUDGES' GOOD INTENTIONS AND HARM OUR CHILDREN 10

Hanushek, Eric A.
The Failure of Input-Based Schooling Policies, 113 ECONOMIC J. 64 (2003) 9, 47

Joint Legislative Budget Committee,
JOINT CAUCUS BUDGET UPDATE (Jan. 14, 2009), *available at* http://www.azleg.gov.....48

Lindseth, Alfred A.
The Legal Backdrop to Adequacy, in COURTING FAILURE: HOW SCHOOL FINANCE LAWSUITS EXPLOIT JUDGES' GOOD INTENTIONS AND HARM OUR CHILDREN (Eric A. Hanushek ed., 2006) 10

National Conference of State Legislatures, UPDATE ON STATE BUDGET GAPS: FY2009 & FY2010 (Feb. 6, 2009) 48

Not Getting Left Behind, WASHINGTON POST, Feb. 5, 2006 60

Rotherham, Andrew.
Toward Performance-Based Federal Education Funding (Apr. 1999) 11

Rudalevige, Andrew.
No Child Left Behind: Forging A Congressional Compromise, in NO CHILD LEFT BEHIND? (Paul E. Peterson & Martin R. West, eds. 2003) 11

THE COMPACT OXFORD ENGLISH DICTIONARY (2d ed. 2000) 58

West, Martin R. & Paul E. Peterson.
The Adequacy Lawsuit: A Critical Appraisal, in SCHOOL MONEY TRIALS (Martin R. West & Paul E. Peterson, eds. 2007) 9

West, Martin R. & Paul E. Peterson.
The Politics and Practice of Accountability, in NO CHILD LEFT BEHIND? (Paul E. Peterson & Martin R. West, eds. 2003) 8

INTRODUCTION

This case has drawn the federal judiciary into a highly politicized debate among Arizona's citizens and local officials over how to structure (and fund) Arizona's programs for teaching English to students as a second language. What began as a declaratory judgment action concerning the adequacy of English-language-learner ("ELL") programs in Nogales Unified School District ("Nogales"), a single school district on the Arizona-Mexico border, has mutated into a sweeping, state-wide injunction against Arizona's officials. Specifically, the district court has ordered the Arizona Legislature, on threat of multi-million-dollar penalties, to enact legislation that substantially increases state-wide funding for ELL instruction.

Whatever the merits of the injunction when it was first entered in 2001, Arizona is not engaged in a continuing violation of federal law and the injunction is no longer appropriate. It is undisputed that successful structural reforms in Nogales have invigorated local school management, improved teacher quality, increased salaries, cut costs, eliminated shortages in instructional materials, reduced class sizes, and implemented monitoring programs to ensure that all students are meeting performance standards. The Arizona Legislature has more than doubled ELL funding and substantially expanded overall school funding, which individual school districts may use as needed for ELL instruction. Teachers and educational experts agree that Nogales is running "exemplary"

ELL programs and has adequate financial resources to help ELL students overcome language barriers. *See* JA 146, 192, 199-200. Equally important, in 2002, Congress passed comprehensive education reform that seeks to promote accountability by preserving flexibility for local educational officials, vests regulatory oversight in the Department of Education, and sets measurable performance objectives that States and local schools are required to attain.

In the wake of these developments, the Ninth Circuit should have applied a "flexible" standard under Federal Rule of Civil Procedure 60(b), as required under this Court's precedents. Instead, the Ninth Circuit applied the wrong standard, relied on its own elaborate "factual findings," and second-guessed the educational policies favored by Arizona's local officials. The upshot is that, with the State currently laboring under a billion-dollar deficit, the Arizona Legislature finds itself cabined by the equitable powers of the Article III branch. Even more troubling, the federal judiciary's mandate could well harm the very students it is supposed to serve. Petitioners are deeply concerned that, because ELL-specific funding is based on the number of students participating in ELL programs—not the number of students who become proficient in English—the lower courts' approach will create perverse incentives to keep students languishing in special-language programs.

OPINIONS BELOW

The opinion of the court of appeals is reported at 516 F.3d 1140, and reprinted at Pet. App. 1a. The district court's order denying relief under Federal Rule of Civil Procedure 60(b) is reported at 480 F. Supp. 2d 1157, and reprinted at Pet. App. 96a. The district court's order finding a violation of the Equal Educational Opportunity Act, 20 U.S.C. §§ 1701 *et seq.*, is reported at 172 F. Supp. 2d 1225, and reprinted at Pet. App. 117a.

JURISDICTION

The court of appeals rendered its decision on February 22, 2008, and denied a timely petition for rehearing and rehearing en banc on April 17, 2008. Pet. App. 92a. On July 11, 2008, Justice Kennedy extended the time for filing the petition to and including September 1, 2008. (Because September 1, 2008 was a legal holiday, the time for filing was extended to and including September 2, 2008. *See* S. Ct. R. 30.1.) The petition was filed on September 2, 2008, and granted on January 9, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

Title 20, section 1703 of the United States Code, codifying the Equal Educational Opportunity Act of 1974, provides in pertinent part:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by ...
>
> (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

The pertinent parts of Title 20, sections 6301 *et seq.* of the United States Code, codifying the No Child Left Behind Act of 2001, are reprinted at Pet. App. 193a.

Rule 60(b) of the Federal Rules of Civil Procedure is set forth in its entirety at Pet. App. 335a.

For the Court's convenience, the most cited provisions from the pertinent statutes and rules are set forth in the Addendum to this brief.

STATEMENT OF THE CASE

This case calls upon the Court to address once again the proper standards under Rule 60(b) for modifying a district court decree in the context of institutional reform litigation.

A. The Statutory Framework

The issues in this case arise at the intersection of two parts of the Elementary and Secondary Education Act of 1965 ("ESEA"), as amended: (i) Title II of the 1974 amendments, Equal Educational Opportunities and Transportation of Students, known as the "Equal Educational Opportunity Act of 1974" ("EEOA"), *see* Pub. L. No. 93-380 (Aug. 21, 1974); and (ii) Title I of the 2002 amendments, Strengthening and Improvement of Elementary and Secondary Schools, known as the "No Child Left Behind Act of 2001" ("NCLB"), *see* Pub. L. No. 107-110 (Jan 8, 2002).

1. The Equal Educational Opportunity Act

In 1974, Congress enacted the EEOA, alongside revisions to the Bilingual Education Act, as an amendment to the ESEA. *See* Pub. L. No. 93-380, 88 Stat. 484. The EEOA declares that, as a national policy, "all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex or national origin." 20 U.S.C. § 1701(a). Focused on the then-profound problems of desegregation, the 1974 measure's stated purpose is to "specify appropriate remedies for the orderly removal of the vestiges of the dual school system." *Id.* § 1701(b).

1. Although the EEOA permits any individual "denied an equal educational opportunity" to "institute a civil action" in federal district court, *id.* § 1706, Congress carefully delimited the statutorily-available remedies. The EEOA mandates that a court "shall seek or impose *only* such remedies as are *essential* to correct *particular* denials of equal educational opportunity or equal protection of laws." *Id.* § 1712 (emphasis added). The statute identifies a "priority of remedies" and, before the grant of any form of relief, requires courts to make "specific findings on the efficacy" of the remedies it has chosen. *Id.* § 1713.

In seeking to eliminate the vestiges of dual school systems, Congress also prohibited discrimination against non-English-speaking students. Section 1703(f) provides:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—
>
> (f) the failure by an educational agency to take *appropriate action* to overcome language barriers that impede equal participation by its students in its instructional programs.

(emphasis added). Congress provided no guidance, however, as to the meaning of "appropriate action." The statute fails to define the term, and the legislative history is unilluminating. *Castaneda v. Pickard*, 648 F.2d 989, 1007 (5th Cir. 1981).

2. Lamenting the absence of congressional guidance, the Fifth Circuit in its oft-cited *Castaneda* decision "reluctantly" crafted a three-part test for measuring compliance with section 1703(f): (i) whether the school's language remediation plan is grounded in sound educational theory; (ii) whether the school's "programs and practices" are "reasonably calculated to implement effectively" that theory; and (iii) whether the school's programs over time produce satisfactory results. *Id.* at 1009-1010. In fashioning its tripartite test, the Fifth Circuit emphasized that "Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques" necessary to satisfy the EEOA's strictures. *Id.* at 1009. The court expressly warned against substituting the federal judiciary's "educational values and theories for the educational and political decisions reserved to state or local school authorities or the expert knowledge of educators." *Id.* at 1009.

2. Changes In Educational Theory

In the decades following the EEOA's enactment, educational theory underwent a sweeping transformation. Discrediting the notion that more money constitutes a magical formula for improving struggling schools, significant evidence showed that certain approaches to education were more effective than others, and that court-mandated reforms often do more harm than good. A rising chorus of educational experts urged the federal government to jettison its narrow focus on increasing resources and, instead, to create proper

incentives for effectively employing the funding already being channeled into America's schools.

1. In the first half of the Twentieth Century, the American education system was widely regarded as the best in the world. Americans were "proud of what their schools had already accomplished," and education "came to be seen as the solution to almost all the country's ailments," including "problems associated with civil rights, ... immigration, ...[and] economic inequality." Martin R. West & Paul E. Peterson, *The Politics and Practice of Accountability, in* NO CHILD LEFT BEHIND? 4 (Paul E. Peterson & Martin R. West, eds. 2003). In the late 1970s and early 1980s, however, this sanguine view of America's public school system came under assault. Standardized test scores showed that (i) student performance declined throughout the 1970s, and (ii) American students were lagging far behind their peers in other countries. *Id.* at 5. In 1983, a national commission appointed by the Secretary of Education issued a widely-discussed report, entitled *A Nation At Risk*, that called for wide-ranging reforms in the nation's public schools. *A Nation At Risk* warned that the "quality of America's schools was leaving the country endangered by foreign competition." *Id.* at 5-6.

2. At the same time, advocates for increased school spending turned to the judiciary to attain policy outcomes that could not be achieved through democratic processes. Although cases were brought under different theories, the animating principle was often the same—more resources would beget improved student achievement. The period

between the 1970s and late 1990s therefore witnessed a steady growth in litigation seeking to compel increases in public-school funding. Responding to court orders became "a consuming concern for governors and legislators" forced to balance demands for expanded educational spending "against revenue constraints and other fiscal obligations." Martin R. West & Paul E. Peterson, *The Adequacy Lawsuit: A Critical Appraisal, in* SCHOOL MONEY TRIALS 2 (Martin R. West & Paul E. Peterson, eds. 2007).

In the midst of this rising litigation, mounting evidence suggested that "[i]ncreased spending on school inputs ha[d] *not* led to notable gains in school performance." Gary Burtless, *Introduction and Summary, in* DOES MONEY MATTER? THE EFFECT OF SCHOOL RESOURCES ON STUDENT ACHIEVEMENT AND ADULT SUCCESS 5 (Gary Burtless, ed. 1996) (emphasis added). Even though average spending per student, controlling for inflation, increased by more than 60 percent between 1966 and 1980, American students were not receiving a better education. Leading scholars from different fields reached similar conclusions: "[b]road evidence from the experience" both in the United States and in "the rest of the world" showed that significantly expanding financial resources was not helping America's schoolchildren. Eric A. Hanushek, *The Failure of Input-Based Schooling Policies*, 113 ECONOMIC J. 64, 66-69 (2003) (although "input policies have been vigorously pursued over a long period of time," there "is no evidence that the added resources have improved student performance").

3. A dramatic example of the litigation-driven approach to education reform is *Jenkins v. Missouri*, involving the desegregation of public schools in Kansas City, Missouri. *See Jenkins v. Missouri*, 639 F. Supp. 19, 23-24 (W.D. Mo. 1985); *Missouri v. Jenkins*, 515 U.S. 70, 84 (1995). In a series of orders beginning in 1986, a federal court mandated that Missouri spend an additional $1.5 billion to improve the quality of education offered in a school district of 37,000 students. At the court's direction, the school district boosted per-student spending, dramatically increased teacher salaries, reduced teacher work loads and class sizes, and made multi-million dollar investments in state-of-the-art facilities and resources.

The upshot was failure. None of this "court-ordered largess led to better scores by the school district's students on nationally normed tests." Alfred A. Lindseth, *The Legal Backdrop to Adequacy*, *in* COURTING FAILURE: HOW SCHOOL FINANCE LAWSUITS EXPLOIT JUDGES' GOOD INTENTIONS AND HARM OUR CHILDREN 39 (Eric A. Hanushek ed., 2006). Test scores in Kansas City schools "had an almost inverse correlation" to the amount of "improvements" ordered by the district court. Williamson M. Evers & Paul Clopton, *High-Spending, Low-Performing School Districts*, *in* COURTING FAILURE, *supra*, at 111. Like failed efforts in other school districts in other States, the Kansas City experiment further confirmed that "the structural problems of our current educational system are far more important than a lack of material resources." Paul Ciotti, *Money and School*

Performance, *in* SCHOOL REFORM: THE CRITICAL ISSUES 308 (Williamson M. Evers, *et al.* eds., 2001).

4. In April 1999, an influential white paper by Andrew Rotherham of the Democratic Leadership Council Progressive Policy Institute gave voice to an emerging bipartisan consensus calling for a radically revised approach to public education. *See* Andrew Rotherham, *Toward Performance-Based Federal Education Funding* (Apr. 1999); *see also* Andrew Rudalevige, *No Child Left Behind: Forging A Congressional Compromise*, *in* NO CHILD LEFT BEHIND?, *supra*, at 31. The white paper argued that "the federal role in education must become flexible and performance-based." Rotherham, *supra*, at 2. Criticizing attempts to "micro-manag[e]" how "local school officials raise their students and teachers to higher levels of performance," the paper urged the federal government to "get out of the business of accounting for programmatic inputs and instead [to] focus more strategically on empowering citizens with information, setting broad standards and goals, measuring and comparing results, and researching effective strategies for school improvement." *Id.* at 3. Recognizing that "simply spending a lot of money doesn't guarantee that impoverished students are receiving a quality education," the paper argued that the federal government should "demand results" and not "regulate means." *Id.* at 18.

3. The No Child Left Behind Act

Against this backdrop, Congress comprehensively restructured federal education

policy in the No Child Left Behind Act of 2001 ("NCLB"), 20 U.S.C. §§ 6301 *et seq*. The statute is complex, consisting of more than 650 pages of statutory text with approximately 700 more pages of implementing regulations. *See* 34 C.F.R. §§ 200 *et al.* Designed to meet the goal that all students achieve proficiency in reading and math by 2014, NCLB represents a tectonic shift in federal education policy.

NCLB embraces a framework for achieving results-based accountability constructed around three central policy judgments: (i) States and local officials should have flexibility to design and administer programs suited for local circumstances; (ii) the federal government should not dictate schooling inputs (such as funding, class size, and teacher credentials), but instead should focus on outputs, requiring that States and local schools meet objective, measurable student performance standards; and (iii) education presents complex regulatory challenges more appropriately addressed through an administrative process rather than litigation.

Flexibility For Local Educational Officials. Although substantially extending federal oversight of American schools, NCLB is not mandatory—States may "opt out" by electing to forgo federal education funding. 20 U.S.C. § 6311(a)(1). If a State accepts federal funding, however, it is required to develop a compliance plan that requires its schools to implement student skills "assessments" (for example, by administering standardized tests) in each grade. *Id.* § 6311(b)(2)(A). The results of these assessments

are then used to hold local officials accountable by determining whether schools have made "adequate yearly progress" toward meeting proficiency standards. *Id.*

Within these parameters, NCLB leaves States broad discretion to develop their own individualized education plans. Congress designed the statute to "take away power from education bureaucrats and return it to those on the front lines of education: the local schools, the local teachers, and the local parents." 147 Cong. Rec. S. 13,365, 13,385 (Dec. 18, 2001) (statement of Sen. McCain). Accordingly, one of NCLB's express purposes, appearing on the face of the statute, is to "provide" local educational agencies "with the *flexibility* to implement language instruction educational programs, based on scientifically based research on teaching limited English proficient children, that the agencies believe to be the most effective for teaching English." 20 U.S.C. § 6812(9) (emphasis added). Most relevant here, NCLB makes clear that it shall not be construed to require a local educational agency "to establish, continue, or eliminate any particular type of instructional program" for ELL students. *Id.* § 6845.

Outputs Not Inputs. NCLB holds schools accountable for achieving objective, measurable results, but assiduously avoids dictating programmatic inputs. NCLB's focus on assessment means a focus on *student skill* assessment—as opposed to inputs like library books, classroom computers, student-teacher ratios, or expenditures per student. *See id.* § 6311(b).

To achieve its goals, the statute sets out detailed procedures for measuring student proficiency and compiling information to determine whether schools are satisfying performance goals. *See id.* § 6311. Most relevantly, NCLB's Title III—known as the "English Language Acquisition, Language Enhancement, and Academic Achievement Act"—holds state and local educational agencies accountable for the academic progress of ELL students. *Id.* § 6812(8). Title III's requirements, incorporating provisions from the Bilingual Education Act of 1968, are not guidelines but mandates. They are, in a word, extensive.

Every school receiving a Title III sub-grant must develop a "local plan" containing assurances that "programs will enable children to speak, read, write, and comprehend the English language and meet challenging State academic content and student academic achievement standards." *Id.* § 6840. In addition, the school must biennially evaluate its ELL program, providing "a description of the progress made by children in learning the English language and meeting challenging state academic content and student academic achievement standards." *Id.* § 6841(a). Schools are obliged to monitor students and track their achievement "for each of the 2 years after" they depart the ELL program. *Id.* In addition, schools must set "annual measurable achievement objectives" that accurately measure, among other things, a child's "development and attainment of English proficiency." *Id.* § 6842(a)(2). These measurable objectives require annual increases in the percentage of children making progress toward

and attaining English proficiency. *Id.* § 6842(a)(3)(A).

Failure to meet Title III's standards requires a school to jettison ineffective programs. Schools that fail to make adequate annual progress toward satisfying federal proficiency standards are subject to escalating sanctions. *Id.* § 6316(b). If a school fails to make satisfactory progress for two consecutive years, then the school must develop an "improvement plan" and obtain "technical assistance" from the State. *Id.* § 6842(b). If a school fails to make satisfactory progress in four consecutive years, then the local educational agency must either (i) replace "all or most of the school staff" and turn operations over to a private management company, or (ii) surrender control to state government. *Id.* § 6316(b)(8).

Department of Education Oversight. In contrast to the EEOA, NCLB does not include a private right of action. Instead, Congress vested the Department of Education with authority in the first instance to determine whether state compliance plans satisfy federal requirements. States must submit their compliance plans to the Department for approval. For its part, the Department enjoys broad authority to compel compliance with federal programs by withholding federal funds; issuing cease-and-desist orders; entering into compliance agreements; or by "tak[ing] any other action authorized by law." *Id.* § 1234c(a); *see also id.* § 6311(a), (g). The Department's Office of Administrative Law Judges is responsible for conducting hearings in connection with the agency's enforcement actions. *See id.*

§§ 1234(a), 1234e-g (providing for discretionary review of ALJ decisions and judicial review in the courts of appeals).

In addition to jurisdiction over a State's programmatic compliance, NCLB as implemented gives the Department ultimate authority over the complaints of individual students. NCLB requires States to develop "written procedures for the receipt and resolution of complaints alleging violations of law" in the administration of educational programs under the statute. *Id.* § 7844(3). In its implementing regulations, the Department of Education has mandated that States adopt written procedures for "receiving and resolving any complaint from an organization or individual" that a local educational agency "is violating a Federal statute or regulation that applies" to programs operated by local educational agencies under NCLB. 34 C.F.R. § 299.10(a)(1); *see also* 20 U.S.C. § 6311. Implementing NCLB's requirements, Arizona law provides that an aggrieved party may file a complaint with the local education agency and that any adverse decision may be appealed to the Department of Education. *See* R7-2-805.C-F; 34 C.F.R. § 299.11(c).

B. The District Court Proceedings

Long before NCLB, respondents filed this litigation as a declaratory judgment action concerning the adequacy of ELL instruction in a single school district on the Arizona-Mexico border. The litigation has since mutated into a sweeping, state-wide injunctive proceeding against Arizona's officials.

1. The 1992 Lawsuit

1. The Nogales Unified School District, located in Arizona's largest border town, has six elementary schools, two middle schools, one high school, and an alternative high school. Pet. App. 6a. Nearly all of Nogales's student population is Hispanic or Latino. The Census Bureau estimates that 93 percent of Nogales's population (20,878 people) speaks a language other than English at home. As of 2006, approximately 30 percent of Nogales's students were enrolled as English-language-learners, with some 60 percent having previously participated in ELL programs. *See id.*

In 1992, certain Nogales students and their parents filed a class action lawsuit in federal district court against the State of Arizona, the Superintendent of Public Instruction, and individual officials of the Arizona State Board of Education. Alleging violations of the EEOA, plaintiffs sought declaratory and injunctive relief. *See* JA 2-3. Invoking section 1703(f), plaintiffs contended that Arizona officials were not taking "appropriate action" to educate Nogales's non-English speaking schoolchildren. Pet. App. 118a (defining class as "all minority 'at risk' and limited English proficient (LEP) children now or hereafter enrolled in Nogales Unified School as well as their parents and guardians").

2. After lengthy pre-trial proceedings, the parties split the case in two, settling part of it and litigating to trial whether Arizona was adequately funding and overseeing Nogales's ELL programs. Pet. App. 119a-120a. After a three-day bench trial,

on January 24, 2000, the district court granted declaratory relief on the non-settled portion of the case. The court held that local officials were not taking "appropriate action" because, although the State's programs were based on sound educational theory, the State "failed to follow through with practices, resources and personnel necessary to transform the theory into reality." Pet. App. 151a. The district court expressed concern that funding earmarked for ELL programs failed to cover the entire cost of ELL instruction. *See id.* The Court suggested that insufficient funding was adversely affecting Nogales's bilingual-education programs in six respects: (i) too many students in a classroom; (ii) not enough classrooms; (iii) not enough qualified teachers; (iv) not enough teacher aids; (v) inadequate tutoring programs; and (vi) insufficient teaching materials. Pet. App. 149a-150a.

Six months later, on July 31, 2000, the court approved the parties' settlement, as memorialized in a consent decree. The decree resolved plaintiffs' claims with respect to (i) the evaluation and monitoring of students; (ii) tutoring and other compensatory instruction; and (iii) the structure of English language curriculum. Pet. App. 10a. All parties here agree that, in light of the consent decree, the "*only* unresolved dispute"—and the only EEOA issue on which the district court has based its continuing injunction—is Arizona's alleged "failure to provide school districts with adequate funding." Cert. Opp. 28 (emphasis added).

2. Arizona's ELL Programs

In the wake of the district court's 2000 declaratory judgment, Arizona implemented significant changes in funding, curriculum, and protocols. Pet. App. 30a-31a. These changes have substantially altered how Arizona implements its ELL programs and appreciably increased funding available for ELL instruction.

1. In November 2000, Arizona's voters passed Proposition 203, requiring (i) all classes in Arizona's public schools to be taught in English; and (ii) ELL students to be educated in separate, structured immersion classes until they achieve English proficiency. Pet. App. 369a-379a. Whereas traditional bilingual-education programs taught non-language subjects (such as math, science, and history) in students' native languages, Proposition 203 mandates that, unless parents request bilingual instruction, ELL students be taught in English tailored to a level they can understand. Proposition 203 allows parents to bring suit to enforce its provisions and remains the law in Arizona. *See* A.R.S. § 15-754.

2. In conjunction with restructuring its teaching methodology, Arizona implemented statewide measures designed to enhance the effectiveness of its ELL programs. Arizona's English-immersion instructors must complete a curriculum—available through a partnership between the State and its universities—to obtain the qualification needed to teach ELL students. *See* JA 166-67, 303-13, 364-376. To reimburse educators who obtain this "endorsement," Arizona

has established a $13.5 million annual fund, known as the "SEI Reimbursement Fund." JA 364-376.

Arizona also developed standards for determining whether its programs are in fact operating effectively. *See* JA 200-201. Working with a nationally-acclaimed expert, Arizona created English Language Proficiency Standards that provide ELL instructors with reading and writing performance targets. JA 159-60. The standards were reviewed by a team of national and local experts, and the State conducted regional focus groups to determine whether the standards properly evaluate ELL curricula and student performance. *Id.* The standards have been employed by educators to develop "a viable, consistent and workable curriculum for ELLs and English acquisition." JA 364-376. These standards have been recognized as going from "zero to 10" in providing a benchmark for measuring English proficiency. Pet. App. 339a-340a.

The State's Department of Education has taken an active role in monitoring and working with individual districts to (i) organize ELL classrooms; (ii) arrange class composition; and (iii) determine when ELL students should be transferred to mainstream classes. Pet. App. 354a-355a; A.R.S. § 15-756.08. The Department regularly consults with local ELL instructors and holds monthly ELL development meetings to discuss technical issues, provide information, and answer questions from administrators and teachers. JA 175-176, 364-376. Annual seminars supplement these monthly meetings, and breakout sessions allow teachers to seek additional

assistance. JA 176-179. Department-developed ELL program models guide school districts in effectively organizing and structuring ELL classrooms. JA 184.

Monitoring programs that did not exist in 2000 have been implemented to track ELL students' day-to-day progress. Pet. App. 351a-354a; JA 200-201. Arizona's schools employ the Arizona English Language Learner Assessment ("AzELLA") to test student achievement. The results of these tests are then summarized in annual reports to the State Department of Education identifying the rate at which ELL students are achieving English proficiency. Pet. App. 341a-343a. Arizona requires schools to assess "reclassified" students for two consecutive years after they exit the ELL system, ensuring they are given the best possible opportunity to succeed in mainstream classrooms. A.R.S. § 15-756.06.

To back up these reporting and monitoring requirements, Arizona's English Acquisition Services Division conducts several dozen annual site visits to evaluate local ELL programs and provide assistance as necessary to local administrators. JA 153-154. The Division annually monitors at least 12 school districts or charter schools from the 50 Arizona school districts or charters with the highest number of ELL students, as well as at least 10 school districts where ELL students are a minority of the student population. JA 313-319. The Division also selects a monthly sample of 300 ELL students to test English reading ability. *Id.* If the Division finds that a school is falling short of state standards, the

school is required to take corrective action to address those deficiencies. *Id.*

3. Working with local officials, Arizona has substantially improved Nogales's ELL programs. The benefits of higher-quality teachers, a new tutoring program, and more comprehensive instruction materials have borne measurable results. For instance, the Arizona Department of Education ranked 628 schools (each with more than 100 ELL students enrolled) according to student performance in 2005 on the Arizona Instrument to Measure Skills test. Pet. App. 363a-366a. Nogales had four schools within the top ten, and five within the top 50. Pet. App. 365a-366a. In September 2006, the local Superintendent reported that Nogales "students outscored state averages even when distinctions are made between fluent English-speaking students and English learners." JA 336-338. Compared to other districts with high Hispanic or Latino populations, Nogales's performance was superior at almost every grade level. *Id.*

4. In addition to upgrading its ELL programs, both in Nogales and statewide, Arizona significantly increased the funding available for ELL instruction. In December 2001, the Legislature passed H.B. 2010, doubling the funding each district received per ELL student and appropriating additional money for ELL instruction materials, teacher training, compensatory education, and reclassification of students as English proficient. Pet. App. 380a-428a. Arizona also greatly increased its basic school-funding packages. Pet. App. 31a. Proposition 301,

approved by the voters in 2000, increased the state sales tax by six-tenths of a percent to fund increased base-teacher salaries, teacher-performance pay, and tutoring programs for underperforming students. Pet. App. 358a-361a. Similarly, Arizona's voters approved measures ensuring that a portion of all Indian gaming proceeds are channeled to Arizona's schools. Pet. App. 361a.

As a result of these initiatives, support for overall education grew from an inflation-adjusted $3,139 per pupil in 2000 to an estimated $3,570 in 2006. Pet. App. 31a. The difference is even more pronounced when taking into account local funding, which rose from $5,677 per pupil in 2000 to $6,412 in 2006. *Id.* Federal funding likewise increased, from $526 per pupil in 2000 to about $953 in 2006. *Id.*

5. This trend of dramatic funding increases fully applies to Nogales. In 2000, Nogales voters agreed to increase property taxes to be used for any educational purpose. Pet. App. 430a-431a. The proceeds flowing directly to Nogales as a result of these property tax increases grew from $895,891 in FY2001 to over $1.6 million in FY2007. Pet. App. 431a. Other resources not available in 2000—including the "State Tutoring Fund" and the "AIMS Intervention/Dropout Prevent Program"—contribute millions of dollars annually to Nogales's schools. In 2007 alone, Nogales received approximately $2.3 million in additional funds pursuant to Proposition 301. Nogales's discretionary budget has increased 34 percent from 2000 to 2007. *See* JA 216, 355.

6. These educational improvements have not gone unnoticed by Arizona's most respected teachers. Two such teachers—Ms. Irene Moreno and Ms. Margaret Garcia-Dugan—with over sixty years of combined experience teaching and administrating ELL programs in Arizona's schools testified in support of petitioners. *See* JA 132-141, 147-153. Both teachers testified that Nogales is administering a successful ELL program and providing appropriate ELL instruction to its students. *See* JA 192 (Q: does Nogales "have sufficient resources to provide an excellent program for NUSD's ELL students so they can overcome language deficiencies? A: Yes, very definitely"). As Ms. Garcia-Dugan stated: Nogales "is doing an exemplary job with their English language learners." JA 146.

3. The Legislature's Intervention

Notwithstanding these significant changes in Arizona's ELL programs and substantial increases in educational funding, the district court steadily extended its reach over Arizona's schools.

1. On June 25, 2001, even though the certified class included only Nogales students, the district court expanded its declaratory judgment to apply on a statewide basis and granted injunctive relief accordingly. In doing so, the district court made no particularized findings that any other Arizona school district's ELL programs were ineffective or that any other individual ELL student in any other school district was denied an equal educational opportunity. Instead, the district court justified extending the injunction on grounds

that, as a matter of law, the funding Arizona provided for ELL programs was arbitrary because it "bears no relation to the actual funding" needed to ensure that ELL students achieve "mastery" of essential skills. JA 44.

In 2005, the court concluded that Arizona still was not adequately funding ELL programs because it was not earmarking ELL-specific funds to cover the entire cost of ELL instruction, but was instead permitting local school officials to play a role in ELL funding decisions. Pet. App. 173a-174a. The court then commanded the Legislature, which was not party to the suit, to allocate more taxpayer dollars to ELL instruction or face multi-million-dollar penalties. The court gave the Legislature 15 days from the beginning of the legislative session to comply with its order. In the event the Legislature failed to enact legislation to the court's satisfaction, the State would face fines of $500,000 per day (escalating over time to $2 million per day).

2. The Legislature responded by attempting to satisfy the district court's concerns. After significant negotiation and fact-finding, on March 2, 2006, the Legislature enacted H.B. 2064. H.B. 2064 implemented funding increases of roughly $14 million in what is referred to as "group B" funding (the additional funds a school directly receives for each student in an ELL program); $10 million to fund local ELL programs; and another $7 million to assess student progress and provide ELL materials. Pet. App. 268a. Under these provisions, slated to take effect after the district court's confirmation that Arizona has taken "appropriate action," Arizona's schools will receive $444 in funding for

each ELL student in addition to approximately $7,400 per student in general funding. To the extent this funding is inadequate for any particular school district, H.B. 2064 establishes a statewide compensatory instruction fund, as well as a specific fund for structured-English-immersion that may be used to cover school districts' incremental costs of ELL instruction.

In addition, because the named defendants expressly indicated their support for the district court's injunction, petitioners, the Speaker of the Arizona House and the President of the Arizona Senate, acting in their official capacities as presiding officers of their respective legislative bodies, intervened without objection in March 2006. Pet. App. 175a; *see also* JA 55-85. Along with the Superintendent of Public Instruction, petitioners moved to purge the citation of contempt and sought relief from judgment under Rule 60(b). Pet. App. 28a.

4. The Order On Remand

On April 25, 2006, the district court denied the request to modify the injunction, announcing its dissatisfaction with newly-enacted H.B. 2064. The court insisted the legislation failed to comply with its orders because it did not sufficiently fund ELL education. Pet. App. 176a. Petitioners appealed.

In an unpublished memorandum decision, the Ninth Circuit vacated the district court's prior orders. The court of appeals noted that "the landscape of educational funding has changed significantly" since 2000, and remanded for the district court to hold an evidentiary hearing on

whether changed circumstances "had a bearing on the appropriate remedy." Pet. App. 190a. Upon remand, the district court acknowledged NCLB's dramatic effect on federal and local education policy. Specifically, the district court recognized that, by "increasing the standards of accountability," NCLB "has to some extent significantly changed State educators' approach to educating students in Arizona." Pet. App. 101a. The district court likewise found that the State's Department of Education had taken seriously its role both in creating standards and in overseeing Arizona's ELL programs. Pet. App. 96a-100a. The court further acknowledged that "[t]here is no doubt" Nogales "is doing substantially better than it was in 2000." Pet. App. 99a. The district court nonetheless denied petitioners' Rule 60(b) motion. Pet. App. 115a.

The court declined to modify its injunction because, in its view, the "strides made by" Nogales were "largely" a result of its own "efforts alone." Pet. App. 100a. The court held that Arizona's significant improvements in education quality did "not establish that Arizona is fulfilling its duty to fund ELL programming rationally." Pet. App. 46a. The court further held that H.B. 2064 violated federal law because it purportedly used federal funds to "supplant" rather than "supplement" state monies. Pet. App. 113a-114a. It also determined that providing incentives for schools to teach students English within two years was unreasonable. Pet. App. 114a-115a.

Significantly, the district court's order on remand focused entirely on whether Arizona had

complied with its 2000 order requiring increased funding for ELL instruction. The district court did not consider whether, in light of admitted improvements in Arizona's programs, any student was actually denied an equal educational opportunity. It made no affirmative findings that the performance deficiencies it had noted in 2000 were still extant. And it made no specific findings that its continuing injunction was "essential to correct" any "particular denials of equal educational opportunity or equal protection of the laws." 20 U.S.C. § 1712.

C. The Ninth Circuit's Decision Following Remand

Upon petitioners' appeal, the Ninth Circuit affirmed. Putting aside the legal and educational merits of the educational policy choices being unilaterally made by the district court judge, the Ninth Circuit viewed the case through a narrow procedural lens. The Ninth Circuit thus deemed it improper to grant "relief from judgment on grounds that could have been raised on appeal" from the district court's prior orders. Pet. App. 60a. In the Ninth Circuit's view, because the named defendants had not appealed the legal rulings underlying the district court's 2000 declaratory judgment, the court of appeals had no authority to re-examine the district court's "unappealed legal determinations." *Id.*; Pet. App. 51a, 68a.

According to the Ninth Circuit, to obtain relief under Rule 60(b), petitioners were required to show that the "basic factual premises of the district court's central incremental funding determination

had been swept away, or that there has been some change in legal landscape that makes the original ruling now improper." Pet. App. 63a. The court of appeals emphasized that it is insufficient "to argue for vacating the judgment because of factual or legal circumstances that have not changed the basic premises of the original rulings." *Id.* Instead, the court below required petitioners "to demonstrate either that there are no longer incremental costs associated with ELL programs in Arizona" or that Arizona had altered its funding model. *Id.*

Measured against that standard, the Ninth Circuit found that the "basic premise[]" of the district court's 2000 orders—"ELL students need extra help and that costs extra money"—had not been "swept away." Pet. App. 64a. It interpreted the "recent statewide program to *improve* ELL testing, monitoring, and support programs" as factors weighing *against* a finding of changed factual circumstances, inasmuch as those programs would impose "incremental costs on school districts." *Id.* (emphasis added). And the court below rejected petitioners' argument that focusing solely on ELL-specific funding "is no longer appropriate given general increases in education funding since 2000." Pet. App. 67a.

Finally, the Ninth Circuit concluded that Arizona's compliance with NCLB's standards and requirements did not satisfy the EEOA's "appropriate action" requirement. Pet. App. 72a-81a. Rather than seeking to harmonize the two statutes, the court of appeals focused on the differences in the statutes' purposes, and concluded

that compliance with NCLB was insufficient to satisfy the EEOA's "appropriate action" requirement. In the Ninth Circuit's view, interpreting the two statutes in harmony "would effectively repeal the EEOA by replacing its equality-based framework with the gradual remedial framework of NCLB." Pet. App. 76a.

SUMMARY OF ARGUMENT

1. The Ninth Circuit's decision should be reversed because it fails to apply the correct standard for modifying an injunction under Rule 60(b). Instead of taking the "flexible" approach required under this Court's precedents, *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 385 (1992), the Ninth Circuit refused to modify the district court's injunction absent a showing that circumstances had "radically changed" and that the district court's prior judgment was "so undermined by later circumstances as to render its continued enforcement inequitable." Pet. App. 60a.

Compounding its error, the Ninth Circuit viewed federalism concerns in this case as "substantially lessened" because the former Governor and the State Board of Education "wish[ed] the injunction to remain in place." Pet. App. 52a. But what the Ninth Circuit viewed as a palliative is in fact a poison. Precisely because this litigation has served as a vehicle for certain state officials to achieve policy outcomes not attainable through ordinary democratic processes, the federal judiciary has been drawn into a highly politicized debate over sensitive questions of educational policy

Had the Ninth Circuit applied the proper Rule 60(b) standard, it would have recognized that dramatic changes in circumstances mandated vacatur of the district court's injunction. It would have recognized, as an initial matter, that the district court's funding mandates are no longer permissible under federal law in light of significant

shifts in federal education policy and the express limits that Congress imposed on remedies available under the EEOA. More fundamentally, it would have recognized that profound changes and undoubted improvements in Nogales's ELL programs establish that the district court's injunction is no longer appropriate. The evidence shows that Nogales has cured the performance deficiencies on which the district court based its original order, and it shows that Nogales is "doing an exemplary job" in providing equal educational opportunities to ELL students. JA 145-146.

2. The Ninth Circuit's decision also should be reversed because it fails to afford appropriate deference to the careful congressional policy judgments embodied in NCLB. Under well-settled precedent, because NCLB and the EEOA are embedded in the same complex statutory framework and address the same subject matter, the two statutes should be interpreted "as if they were one law." *See Wachovia Bank v. Schmidt*, 546 U.S. 303, 305 (2006); *United States v. Fausto*, 484 U.S. 439, 453 (1988). Construing the two statutes in harmony, NCLB's elaborate requirements for ELL instruction should serve as a benchmark for "appropriate action" under the EEOA. When a State complies with its NCLB obligations, it is, by definition, taking "appropriate action" for purposes of the EEOA. To read the two statutes any differently would raise grave federalism and separation-of-powers concerns.

3. In presuming to have the institutional expertise to set effective educational and budgetary policy, the Ninth Circuit stepped outside the proper

federal judicial role and intruded on the prerogatives of Arizona's local institutions. As this Court has long recognized, local control over the education of children is a vital national tradition, *See Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977), and unwarranted federal intrusion imposes disruptive burdens on local institutions that undermine the educational process. This Court should reverse the decision below, without occasioning a remand for further proceedings, and direct the vacatur of the district court's injunction.

ARGUMENT

I. The Ninth Circuit Misapplied The Rule 60(b) Standard.

The Ninth Circuit fell into error by applying an inflexible standard under Rule 60(b) in the context of institutional reform litigation. Because it misapplied this Court's precedent, the Ninth Circuit failed to give appropriate consideration to both the dramatic, post-2000 changes in Nogales's ELL programs and the significant shifts in federal education policy embodied in NCLB. Had it followed this Court's teachings, the Ninth Circuit would have recognized that the district court's injunction, even assuming it could be justified when entered, is no longer permissible.

A. Rule 60(b) Requires A "Flexible" Standard In The Context Of Institutional Reform Litigation.

Federal Rule of Civil Procedure 60(b) permits parties to seek relief from a federal court decree "on motion and just terms" if the application of the

decree "prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5). This Court has long held that, in the context of institutional reform litigation, courts should apply a "flexible standard" when reviewing requests for relief under Rule 60(b). *Rufo*, 502 U.S. at 385. A judicial decree should be dissolved or modified if "enforcement of the decree ... would be detrimental to the public interest," *id.* at 393, or "if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen." *System Fed'n No. 91, Ry. Employees' Dep't v. Wright*, 364 U.S. 642, 647 (1961). In addition, a decree must be dissolved or modified if it becomes "impermissible under federal law." *Rufo*, 502 U.S. at 388. An injunction exceeds "appropriate limits" if it is "aimed at eliminating a condition that does not violate" federal law or "flow from such violation." *See Board of Educ. of Oklahoma City Pub. Sch. v. Dowell*, 498 U.S. 237, 247 (1991).

This requisite "flexibility" is especially appropriate in institutional reform litigation where, as here, a federal court's injunction interferes with local officials' control over local institutions. *Rufo*, 502 U.S. at 393 n.14; *Bronx Household of Faith v. Board of Educ. of City of New York*, 331 F.3d 342, 368 (2d Cir. 2002) (noting the "unbroken tradition of federal court deference ... to democratically elected state and local governments in matters concerning education"). Flexibility is required because "such decrees 'reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions." *Rufo*, 502 U.S. at 381 (citation

omitted). Accordingly, a federal court wielding its equitable powers to redress violations of statutory requirements is obliged to give careful consideration to any significant changes in law or factual circumstances. *Agostini v. Felton*, 521 U.S. 203, 215 (1997) (a court "errs when it refuses to modify an injunction ... in light of such changes"). A decree seeking to force institutional reform should remain in place only as long as necessary to remedy past wrongs. *Dowell*, 498 U.S. at 247-48.

These foundational principles were recently reaffirmed in *Frew v. Hawkins*, 540 U.S. 431 (2004). There, a unanimous Court, speaking through Justice Kennedy, put the structural and democratic implications of institutional-reform injunctions at the center of its analysis. The Court emphasized that if a federal injunction is not strictly "limited to reasonable and necessary implementations of federal law," it may "improperly deprive future officials of their designated legislative and executive powers." *Id.* at 441. The Court drew upon principles of federalism and separation-of-powers, noting that these principles "require that state officials"—those with "front-line responsibility" for administering state programs in compliance with federal law—be "given latitude and substantial discretion." *Id.* at 442. *Frew* further stressed that States depend on "successor officials ... to bring new insights and solutions to problems of allocating revenues and resources." *Id.* Accordingly, if a State "establishes reason to modify" a judicial decree, "the court should make the necessary changes." *Id.*

Until the decision below, lower courts have faithfully applied the flexible standard required under this Court's precedents. *See, e.g., Building & Constr. for Trades Council of Philadelphia and Vicinity, AFL-CIO v. NLRB*, 64 F.3d 880, 888 (3d Cir. 1995); *In re Detroit Dealers Ass'n*, 84 F.3d 787, 790 (6th Cir. 1996). These courts have understood and heeded this Court's admonition that judicial decrees must be narrowly tailored to address only "ongoing illegal activity or the past of effects of illegal activity." *Alexander v. Britt*, 89 F.3d 194, 199-200 (4th Cir. 1996); *Evans v. City of Chicago*, 10 F.3d 474, 477-79 (7th Cir. 1993). And they have recognized that respect for separation of powers, local democratic governance, and the broader public interest requires modifying a judicial decree whenever there is reason to do so. *O'Sullivan v. City of Chicago*, 396 F.3d 843, 862-63 (7th Cir. 2005) (citing *Evans*, 10 F.3d at 479-80). Faced with modification requests, federal courts are duty bound to "preserve" the interests of "democratic governance" and resolve all doubts "in favor of leeway for the political branches." *Evans*, 10 F.3d at 479.

B. The Ninth Circuit's Decision Violates This Court's Precedents.

The Ninth Circuit's decision should be reversed because it deviates significantly from this Court's doctrine and precedents. The decision is infected with at least three fundamental errors.

1. The Ninth Circuit Applied The Wrong Standard.

The Ninth Circuit applied a standard under Rule 60(b) inconsistent with the flexible approach mandated by this Court's decisions. The court of appeals refused to consider whether dissolving the injunction was in the broader public interest or whether the "original decree" could have been "issued on the state of facts that now exist." Pet. App. 51a n.31. It instead erected an almost insurmountable hurdle for modifying the district court's eight-year-old injunction.

Specifically, the court of appeals required a showing either "that the basic factual premises of the district court's" original injunction "had been swept away" or that changes in law rendered "the original ruling ... improper." Pet. App. 63a. The court thus suggested that, absent a showing that the legal or factual "landscape" had "radically changed," it would not grant relief under Rule 60(b). Pet. App. 72a. According to the Ninth Circuit, an injunction should not be modified except "in instances, *likely rare*, in which a prior judgment is *so undermined* by later circumstances as to render its continued enforcement inequitable." Pet. App. 60a (emphasis added).

The Ninth Circuit's decision, in practical effect, resurrects the standard set out in *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932). That daunting standard requires that "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions" can justify modifying a decree. *Id.* at 119. Not surprisingly, the Ninth Circuit's decision echoes approaches

taken decades ago by courts applying *Swift*. For example, the Eighth Circuit noted forty years ago that, under *Swift*, "some change is not enough" and that Rule 60(b) relief may not be granted unless "the dangers which the decree was meant to foreclose must almost have disappeared." *Humble Oil & Refining Co. v. American Oil Co.*, 405 F.2d 805, 813 (8th Cir. 1969).

But this Court has emphatically held that the *Swift* standard does *not* apply in the federalism-sensitive context of institutional reform litigation. *Dowell*, 498 U.S. at 247. The standard applied by the Ninth Circuit was far too "stringent." *Rufo*, 502 U.S. at 380; *see also Frew*, 540 U.S. at 441.

2. The Ninth Circuit Focused On The Wrong Considerations.

In addition to applying an erroneous standard, the Ninth Circuit's decision was contaminated by its focus on wrong considerations. The Ninth Circuit's decision suggests that federalism concerns in this case are "substantially lessened" because the former Governor of Arizona and the State Board of Education "wish[ed] the injunction to remain in place." Pet. App. 52a. The Ninth Circuit thus stressed that its ruling rested largely on procedural considerations, saying it could not grant "relief from judgment on grounds that could have been raised on appeal." Pet. App. 60a. In the court of appeals' view, a Rule 60(b) motion "may not be used to remedy a failure to contest in the first instance the legal rulings underlying the judgment." Pet. App. 51a, 68a (refusing to "reopen matters made final when the [original] [j]udgment was not appealed").

That approach is misguided. Courts have long held that a party's "consent" to an injunction—either because it fails to appeal or because it does not seek modification—is irrelevant in the context of institutional reform litigation. *Cf. Swift*, 286 U.S. at 119 (a decree may not be modified if it was entered "after years of litigation with the consent of all concerned"; courts are "not at liberty to reverse under the guise of readjusting"). If "consent" were relevant, then this Court's decisions in *Rufo* and *Frew* would have reached a different result. Both cases, after all, involved unappealed "consent" decrees.

More fundamentally, the fact that certain state officials consented to the injunction should have spurred the Ninth Circuit in the direction of heightening, as opposed to relaxing, its vigilance. *See Evans*, 10 F.3d at 478 ("democracy does not permit public officials to bind the polity forever"); *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 846 (5th Cir. 1993) (en banc) ("[c]ourts must be especially cautious when parties seek to achieve by consent decree what they cannot achieve by their own authority"). The Ninth Circuit's position turns a blind eye to the serious, real-world federalism concerns raised by the Arizona Attorney General's failure to mount a vigorous defense of Arizona's laws and education system. Pet. App. 28a (noting that the Attorney General and Board of Education abandoned their "defense of the suit" and argued "*against* Arizona's own law") (emphasis in original); *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J.,

concurring) ("abdication of responsibility is not part of the constitutional design").

As this Court has recognized, "powerful incentives" might lead state officials "to view departures from the federal structure to be in their personal interests." *New York v. United States*, 505 U.S. 144, 182 (1992). Indeed, state officials may perversely "prefer the supervision of a federal court to confronting directly its employees and the public." *United States v. Miami*, 2 F.3d 1497, 1507 (11th Cir. 1993). This Court has accordingly held that a "departure from the constitutional plan cannot be ratified by the 'consent' of state officials." *New York v. United States*, 505 U.S. 144, 181 (1992). The fundamental "purpose served by our Government's federal structure" is not for the benefit of "public officials governing the States," but to better secure liberty. *Id.* at 181; *see also Clinton*, 524 U.S. at 450 ("[l]iberty is always at stake when one or more of the branches seek to transgress the separation of powers"). Simply put, state officials "cannot consent to the enlargement" of federal powers beyond those enumerated in, and properly exercised under, the federal Constitution. *New York*, 505 U.S. at 182; *see also Clements*, 999 F.2d at 846 ("[c]onsent is not enough when [citizens] seek to grant themselves powers they do not hold outside of court"). Here, by not vigorously defending the state's interests as a democratic polity in this litigation, the former Governor and her allies won by losing. That is, the district court's orders allowed those officials to achieve policy outcomes otherwise not attainable through democratic processes.

At the very least, the Ninth Circuit should have recognized that the consent of the named parties "cannot dispose of the valid claims of nonconsenting intervenors." *Local 93, Int'l Ass'n v. City of Cleveland*, 478 U.S. 501, 529 (1986); *Evans*, 10 F.3d at 478 (consent is irrelevant especially when "one of 'the parties' did not consent"). Critically, even assuming former Governors can bind their successors (they cannot), the fact is that the House and Senate leadership have never consented to the district court's injunction, and promptly intervened after the district court ordered the Legislature to pass legislation on threat of multi-million-dollar fines. *Cf. Martin v. Wilks*, 490 U.S. 755, 763 (1989) ("a party seeking a judgment binding on another cannot obligate that person to intervene; he must be joined"); *Coleman v. Miller*, 307 U.S. 433, 438 (1939) (legislatures have legal interest in preserving their votes and the integrity of the legislative process). Contrary to the Ninth Circuit's assertions, the Speaker of the House and the President of the Senate intervened in these proceedings not as "individual legislators," but in their official capacity as duly appointed representatives of their respective bodies. *See* JA 80-85. Even assuming that past actions estopped other Arizona officials, the Arizona Legislature has never consented to the district court's injunction, and it deserved the chance to contest that decision on its merits.

3. The Ninth Circuit Employed The Wrong Legal Baseline.

Because the Ninth Circuit failed to apply the proper Rule 60(b) standard, it posed the wrong

question. Instead of considering whether the district court's injunction remains necessary to prevent continuing violations of federal law—that is, whether Arizona is failing to take "appropriate action" to overcome language barriers—the court of appeals focused narrowly on whether Arizona has complied with the district court's funding mandates.

The Ninth Circuit's discussion makes abundantly clear that it refused to modify the district court's injunction unless factual or legal circumstances changed the "basic premises" of the district court's "original rulings." Pet. App. 63a. In the Ninth Circuit's view, those basic premises include that "ELL students need extra help and that costs extra money." Pet. App. 69a. The Ninth Circuit thus focused its Rule 60(b) inquiry on one issue: whether Arizona has provided enough ELL-specific funding to cover all costs of ELL instruction. *Id.* (for "eight years the parties have litigated based upon that premise"); *see also id.* (if petitioners "believed that the district court erred and should have looked at all funding sources differently ... they should have appealed").

According to the Ninth Circuit, "looking to the adequacy of ELL-specific funding does not miss the forest for the trees"; rather, it "cuts to the heart of this case, which has been about such funding since 2000, when the parties dealt with the other issues in a consent decree." *Id.*; *see also* Cert. Opp. 28. The Ninth Circuit concluded that, because "[n]othing significant has changed to undermine" the district court's initial ruling, and because that ruling was not challenged on appeal, nothing

justified "relief from judgment without compliance" with the district court's order. Pet. App. 71a-72a.

Here, too, the Ninth Circuit's approach runs counter to controlling precedent. Those authorities hold that an injunction exceeds "appropriate limits" if it is "aimed at eliminating a condition that does not violate" federal law or "flow from such violation." *Dowell*, 498 U.S. at 247; *Frew*, 540 U.S. at 442. The district court's injunction should be implemented only so long as there is a substantial continuing violation of federal law, not simply a continuing violation of the district court's much-earlier order. *Evans*, 10 F.3d at 477-80.

Of pivotal importance in this respect, the EEOA does not mandate any particular level of ELL-specific funding. Nor does it dictate any "programs and techniques" that States and local educational authorities must "use to meet their obligations." *Castaneda*, 648 F.2d at 1009. Accordingly, because the requirement to provide earmarked ELL-specific funding for ELL programs is a creation of the Ninth Circuit's decision, not a requirement embodied in federal law, the Ninth Circuit was duty bound to consider whether, in light of various changes in Nogales's ELL programs, increased ELL-specific funding remained necessary to ensure that Nogales's ELL students receive equal educational opportunities.

To conduct the proper inquiry, the Ninth Circuit should have noted that, apart from its funding concerns, the district court's 2007 order denying relief under Rule 60(b) contains no particularized factual findings that Arizona's ELL

students are not receiving equal education opportunities. *See* 20 U.S.C. § 1703. The court below also should have considered—in light of all funding available to Nogales and with appropriate deference to state and local educational agencies—whether changes in Nogales's schools showed that Arizona was taking "appropriate action" to overcome language barriers. And, finally, even if Arizona were deemed to be not taking appropriate action, the court of appeals should have considered whether the district court's continuing injunction remained "essential to correct particular denials of equal educational opportunity." 20 U.S.C. § 1712; *Rufo*, 502 U.S. at 388 (decree must be modified if it becomes "impermissible under federal law").

C. Arizona Has Satisfied The "Flexible" Standard Under Rule 60(b).

Applying the "flexible" Rule 60(b) standard dictated by federalism and separation-of-powers concerns and mandated by this Court's decisions, Arizona is entitled to relief. Even assuming the district court's rulings were lawful when rendered, changes in fact and law have since rendered those funding-focused mandates legally impermissible.

1. Changes In Fact Require Reassessing The Injunction.

Dramatic changes in circumstances on the ground, reflecting fundamental changes in Nogales's ELL programs, confirm that the district court's injunction should not be enforced. These changes, combined with a better understanding of the need for proper incentives, make clear that the district court's funding mandates are no longer

appropriate. *See New York State Ass'n for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 969 (2d Cir. 1983) ("judicially-imposed remedies must be open to ... improvement when a better understanding of the problem emerges").

The evidence shows that Arizona has cured the specific performance deficiencies on which the district court based its original order, *see* Pet. App. 61a; that Arizona is implementing NCLB's detailed requirements for educating ELL students, *see* JA 364-376; and that, as witnesses for both sides testified below, Nogales is conducting effective ELL programs. *See* JA 228-229; *see also* JA 146.

The evidence further shows that Nogales has implemented structural reforms to employ funding efficiently and productively. It has hired more qualified teachers, *see* JA 105-107; developed an effective tutoring program, *see* JA 320-335; and substantially increased average teacher salaries. *See* JA 361-363 (salaries have increased from $29,000 in 1998 to $41,000 in 2006). As the Ninth Circuit conceded, Nogales has reduced class sizes, "improved teacher quality," fired unqualified teachers' aides, developed a uniform system of textbook and curriculum planning, and largely eliminated shortages in instructional materials. Pet. App. 35a-36a. In addition, Nogales has implemented local monitoring programs to ensure that all students, including ELL students, are meeting performance standards, *see* JA 126-128, while at the same time taking affirmative steps to eliminate wasteful, inefficient practices. *See* JA 115-116. In short, policies adopted by Nogales have "ameliorated or eliminated" the "inadequacies

discussed by the district court" in its initial 2000 order. Pet. App. 35a.

The evidence also demonstrates that Nogales has more than sufficient funds to run its ELL programs. Millions of dollars in funding that did not exist in 2000 are now flowing into Nogales's schools and its ELL programs. This funding includes "State Tutoring Fund" ($1.5 million each year) and the "AIMS Intervention/Dropout Prevent Program" ($5.2 million annually as of 2006-2007), which target underperforming and high-risk students. *See* JA 339-340. Nogales's maintenance and operating budget has increased by 34 percent from 2000 to 2007. *See* JA 215, 355. Nogales's per-student expenditures have substantially increased. *See* JA 342-360. Indeed, in some instances, Nogales has not exhausted or even applied for available funds. *See* JA 94-95, 339-340. These uncontested facts confirm the testimony of the Deputy Associate Superintendent of Arizona's Academic Achievement Division: Nogales "has the resources required to adequately fund [its] ELL programs." JA 360.

Significantly, in rejecting the request for Rule 60(b) relief, the district court did not meaningfully address these changed circumstances. The district court failed to make a single factual finding that, as of 2006, Nogales was still failing to take appropriate action to overcome language barriers that might otherwise impede access to equal educational opportunities. Pet. App. 96a-116a. Instead, the trial court relied on outdated findings, made six years earlier, and held that, in its view, the ELL-specific funding provided in H.B. 2064 was

not rationally related to the actual funding "needed to insure that ELL students could achieve mastery of the State's academic standards." *Id.* at 116a.

Because the district court made no findings addressing the factual circumstances as they then existed on the ground, the Ninth Circuit attempted to backfill the lower court's Rule 60(b) denial. *See Missouri*, 515 U.S. at 100 (criticizing court of appeals for attempting to "assemble an adequate record"). The Ninth Circuit thus combed the record below and fashioned its own assessment of record facts. But, here again, the Ninth Circuit's selective factual recitation only confirms how far the courts below have strayed beyond the proper judicial role.

The Ninth Circuit asserted, for example, that Nogales faces "significant resource constraints" and that more money would (i) help further reduce class size; (ii) make it easier to recruit fully-qualified teachers; and (iii) make it possible to hire trained teacher's aides. Pet. App. 36a. But, as noted above, sound educational theory establishes that merely increasing resources, absent proper incentives, will not necessarily result in better educational outcomes for students. *See* JA 201-202; Hanushek, *supra,* at 64, 66-69. The hard lessons of the federal courts in Kansas City teach otherwise.

More fundamentally, the simple suggestion that any school district would prefer more, as opposed to less, resources bespeaks an inadequate awareness of the real challenges confronting Arizona's schools and the flinty reality that resources are never limitless. *See* National Conference of State Legislatures, UPDATE ON STATE

BUDGET GAPS: FY2009 & FY2010, at 3 (Feb. 6, 2009); Joint Legislative Budget Committee, JOINT CAUCUS BUDGET UPDATE, at 14 (Jan. 14, 2009) (Arizona faces a $3 billion budget deficit in FY2010), *available at* http://www.azleg.gov. After all, the EEOA requires only that schools take "genuine and good faith effort[s], consistent with local circumstances *and resources*, to remedy the language deficiencies of their students." *Castaneda*, 648 F.2d at 1009 (emphasis added).

The Ninth Circuit did recognize that *reclassified* ELL students are doing as well as native English speakers, cheerily characterizing this as a "clear bright spot" in Arizona's performance. Pet. App. 41a. Rightly so. Record evidence shows that, in many respects, reclassified ELL students are outperforming native English-speaking students. *See* JA 191 (reclassified students outperform native English speakers on standardized math tests); JA 97 (90 percent of reclassified students passed standardized AIMS test, as compared to 68 percent statewide average). The Ninth Circuit nonetheless complained that students who remain in Arizona's ELL programs "fall behind the district average for all students." Pet. App. 39a. It also noted that "lower grade[]" ELL students are performing "substantially better than ELL students in higher grades." Pet. App. 38a.

But these observations are utterly irrelevant to the issue whether local officials responsible for administering Nogales's ELL programs are satisfying their EEOA obligations. It is commonsense that, on average, ELL students who

are still learning English will not perform as well on standardized tests (written in English) as students who have already attained English proficiency. Likewise, the fact that older ELL students do not perform as well as younger ELL students confirms the Legislature's desire to create proper incentives to prevent students from languishing in ELL programs. *See* JA 204-205. Neither observation says anything meaningful about whether the local educational agency is taking appropriate action, "consistent with local circumstances and resources," to overcome language barriers. *Castaneda*, 648 F.2d at 1009.

Had the court below compared Nogales's ELL students to their ELL peers in other districts, the panel would have recognized that Nogales's ELL programs are ahead of the curve. Arizona ranked 628 schools based on their 2005 performance on standardized tests. Nogales placed four schools in the top ten and five in the top fifty. *See* Pet. App. 363a-366a. As recently as 2006, Nogales outscored other districts with high ELL populations at almost every grade level. *See* JA 336-338. For example, 63 percent of Nogales's ELL students passed third-grade reading as compared to 31 percent of ELL students statewide. *Id.* Similarly, 25 percent of Nogales ELL students passed tenth-grade writing as compared to 13 percent of ELL students statewide. *Id.*

In short, no one disputes the truism that there is always something different that might be done to help ELL students overcome language barriers. But that is decidedly not the question that should have engaged the courts below. The question,

rather, is whether the actions of Nogales school officials could justify a continuing federal court injunction mandating dramatic increases in ELL-specific funding. The lack of any findings on that critical issue, the overwhelming evidence that Nogales's schools are conducting effective ELL programs, and the substantial funding increases Nogales's ELL programs have experienced over the past six years all confirm that circumstances have changed. The district court's injunction, in sum, is no longer required or permissible.

2. Changes In Law Require Reassessing The Injunction.

Because a district court injunction may not seek to eliminate a condition that does not violate federal law or "flow from such a violation," *Dowell*, 498 U.S. at 247, an injunction should be withdrawn upon request if a subsequently-enacted statute brings a party into compliance with governing law. *See David B. v. McDonald*, 116 F.3d 1146, 1149-50 (7th Cir. 1997); *Ferrell v. HUD*, 186 F.3d 805, 813-14 (7th Cir. 1999). As this Court has emphasized, a "consent decree must of course be modified if, as it later turns out, one or more of the obligations placed upon the parties has become impermissible under federal law." *Rufo*, 502 U.S. at 388. Moreover, even if an injunction does not technically violate federal law, modification is in order if, in light of changes in federal policy, its continued enforcement "would be detrimental to the public interest." *Id.* at 384.

Significant changes in the operative legal framework have left the district court's outdated funding mandates at war with current statutory

policies; contrary to the broader public interest; and impermissible as a matter of law. *See Wright*, 364 U.S. at 651 (court decree should be modified when "a change in law" brings the decree in "conflict with statutory objectives"). In particular, the district court's injunction raises grave concerns posed by "federal-court oversight of state programs for long periods of time even absent an ongoing violation of federal law." *Frew*, 540 U.S. at 441. Because court-mandated increases in funding are not an "appropriate" approach for reforming schools, the district court's injunction is no longer in the public interest.

II. Congressionally Mandated Requirements For ELL Instruction Set A Benchmark For "Appropriate Action" Under The EEOA.

NCLB invigorates the EEOA by setting out detailed, objective requirements that courts can employ in determining whether state policymakers are taking "appropriate action." Instead of construing those two sets of amendments to the same underlying statute—the ESEA—in harmony, the Ninth Circuit read them in isolation. By virtue of this interpretive approach, the court below imposed requirements on Arizona that contravene Congress's careful policy judgments.

A. Statutes Addressing The Same Subject Matter Should Be Interpreted In Harmony.

Under settled principles of statutory construction, courts should "begin with the language employed by Congress" and assume "that the ordinary meaning of that language accurately

expresses the legislative purpose." *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (quotation omitted). The words of a statute "must be read" in "context and with a view to their place in the overall statutory scheme." *Doe v. Chao*, 540 U.S. 614, 630 (2004) (citation omitted). Because statutory construction is a "holistic endeavor," it must "account for a statute's full text," as well as its "structure" and "subject matter." *United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993).

1. Complying With NCLB's Detailed Requirements Is "Appropriate."

In adding the 1974 EEOA amendments to the ESEA, Congress provided "almost no guidance, in the form of text or legislative history," to assist in determining whether a local educational agency is taking "appropriate action to overcome language barriers." *Castaneda*, 648 F.2d at 1007. Congress instead enacted an elastic standard, requiring courts to determine what is "appropriate," in light of experience and evolving understandings, with deference to the expertise and prerogatives of local officials. *See id.*

A generation later, in enacting further amendments to the ESEA in the comprehensive 2002 NCLB legislation, Congress was undoubtedly aware that the provisions and purposes of NCLB "would have to coexist" with those of pre-existing ESEA statutes, including the EEOA. *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (superseded by statute on other grounds). Congress hardly could have thought otherwise. An entire title of NCLB,

with multiple parts and subparts, sets forth elaborate requirements for ensuring that States take action to ensure that ELL students attain English proficiency and receive the same educational opportunities as other students. *See* 20 U.S.C. §§ 6812, 6823 (local agencies must ensure that ELL students meet the "same challenging State academic content and student academic achievement standards as all children are expected to meet"). The later, more specific, more targeted requirements of NCLB should inform, and not be overridden by, the earlier, more general, more open-ended mandate of the EEOA. *See Hinck v. United States*, 127 S. Ct. 2011, 2015 (2007) ("'a precisely drawn, detailed statute pre-empts more general remedies'"); *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("it is a commonplace of statutory construction that the specific governs the general").

The plain, everyday understanding of the term "appropriate action" undoubtedly encompasses action required under a related statute covering the same subject matter. *See Lopez v. Gonzales*, 549 U.S. 47, 53-54 (2006) (when Congress has not defined a term, "everyday understanding[s] ... should count for a lot"). Not surprisingly, in interpreting the EEOA, courts have not hesitated to examine other amendments to the ESEA as guides to discerning Congress's intent. In *Castaneda*, for example, the Fifth Circuit examined the Bilingual Education Act as providing guidance to the EEOA's proper interpretation. *See Castaneda*, 684 F.2d at 1009.

This holistic interpretive approach is especially appropriate here, where the two statutes at issue are embedded within the same complex statutory framework. Under well-settled principles, the two should be read "'as if they were one law.'" *Wachovia Bank*, 546 at 315-16 (quoting *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972)). As this Court has long recognized, when "several acts of Congress are passed, touching the same subject-matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject." *Marchie Tiger v. Western Inv. Co.*, 221 U.S. 286, 309 (1911); *see also FDA v. Brown & Williamson Tobacco*, 529 U.S. 120, 143 (2000) (subsequent acts may "shape or focus" meanings of earlier statutes); *Fausto*, 484 U.S. at 453.

These long-established principles are further reinforced where, as here, Congress has fashioned a detailed regulatory scheme designed to achieve a delicate balance of competing regulatory objectives. *See Verizon Commn'cs Inc. v. Trinko*, 540 U.S. 398, 412-16 (2004) (regulatory framework under the Telecommunications Act informs proper enforcement of antitrust laws). The congressionally-ordained balance would be disrupted if courts were to interpret the EEOA's open-ended command of "appropriate action" to impose obligations on local educational officials that contradict—and, hence, are not appropriate under—NCLB. *Cf. Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 348 (2001) (because authority granted to administrator sought to achieve "a somewhat delicate balance of statutory

objectives," courts should not impose common-law liability).

2. Courts May Not Grant Remedies Under The EEOA That Conflict With Congressional Policies.

Even if NCLB does not inform the substantive meaning of the EEOA's "appropriate action" requirement, courts nonetheless lack discretion to grant relief inconsistent with the policies embodied in NCLB. The EEOA itself prohibits remedies not "essential" to correcting "particular" denials of equal educational opportunity. 20 U.S.C. § 1712.

This Court's jurisprudence recognizes that, as a matter of separation of powers, "Congress rather than the courts controls the availability of remedies for violations of statutes." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 128 S. Ct. 761, 773 (2008) (citation omitted). The "breadth" of a private right of action "should not, as a general matter, grow beyond the scope congressionally intended." *Id.* (quoting *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1104-1105 (1991)). Under bedrock principles, the decision to extend a cause of action —or to create additional remedies—is one entrusted to Congress, not the judiciary. *See id.*

It is therefore significant that Congress carefully circumscribed the remedies available to cure EEOA violations. *See Morgan v. Kerrigan*, 530 F.2d 401, 412-13 (1st Cir. 1976) (the EEOA was designed to "guide and channel" the exercise of judicial power). The statute mandates that, in "formulating a remedy for a denial of equal educational opportunity," a court "shall seek or

impose *only* such remedies as are *essential* to correct *particular* denials of equal educational opportunity or equal protection of the laws." 20 U.S.C. § 1712 (emphasis added); *Morgan*, 530 F.2d at 413 (EEOA requires "less restrictive means"). Congress specified eight (and only eight) available remedies for curing EEOA violations. In doing so, the Article I branch directed courts to "consider and make specific findings on the efficacy" of each of the specified remedies, individually and in combination, "in correcting" any particular denial of statutory rights. 20 U.S.C. § 1713. The first seven remedies involve assigning students to schools, transferring students to different schools, revising grade structures, constructing new schools, or closing old ones. *Id.* § 1713(a)-(f). The final remedy permits courts to order "the development and implementation of any other plan which is educationally sound and administratively feasible." *Id.* § 1713(g). That remedy may not be imposed, however, unless local officials are first afforded a "reasonable opportunity" to develop their own "voluntary remedial plan." *Id.* § 1758.

The EEOA's specified remedies are significant because they establish that, as a matter of law, so long as state officials are taking the specific actions NCLB requires to provide equal educational opportunities, any additional programmatic, *state-wide* remedy is not "essential." *Id.* § 1712. NCLB requires a State, in consultation with local educational agencies, education-related community groups, parents, teachers, school administrators, and researchers, to develop a plan to ensure that ELL students are able to achieve the same

academic standards that all children are expected to meet. *See id.* § 6812, § 6823(b)(3), (5), § 6826(d). This plan must hold local schools and agencies "accountable for increases in English proficiency and core academic content knowledge of limited English proficient children by requiring ... demonstrated improvements" in English proficiency and "adequate yearly progress." *Id.* § 6812(8).

It follows that in all cases where a State's NCLB plan, developed in conjunction with the local community and educational experts, is approved by the Department of Education, *see id.* § 6823(c), courts have no warrant for invoking a more elastic standard under a much older statute to displace NCLB's requirements. In such circumstances, because the NCLB-approved plan requires the State to ensure equal educational opportunities, the remedy of an additional, potentially conflicting court-fashioned plan is not "essential." Indeed, the expertise, flexibility, and multiple layers of scrutiny built into NCLB's elaborate methodology make it far more likely to achieve reliable and effective educational policies than individual federal courts relegated to defining "appropriate action" through the vagaries of case-by-case litigation.

B. The Ninth Circuit's Approach Cannot Be Squared With Applicable Statutory Requirements.

The Ninth Circuit concluded that, although Congress enacted an entire title of NCLB focused on ELL instruction, those congressional policies are irrelevant to interpreting section 1703(f). The

stated reason: the two statutes purportedly serve "distinct purposes." Pet. App. 72a-73a. In the Ninth Circuit's view, because the EEOA demands "objective, immediate equalization of educational opportunities," Pet. App. 74a, interpreting the EEOA's "appropriate action" requirement in light of NCLB would "effectively repeal the EEOA by replacing its equality-based framework with a gradual remedial framework of NCLB." Pet. App. 76a; *see also* Pet. App. 74a (NCLB "does not deal in the immediate, rights-based framework inherent in civil rights law"). These conclusions are deeply flawed.

The Ninth Circuit's approach drives an unwarranted (and unnecessary) wedge between the EEOA and NCLB. Contrary to the Ninth Circuit's suggestions, nothing in section 1703(f) sets "immediate equalization of educational opportunities" as an objective. Instead, echoing the anthem of the civil rights movement, the statutory language—requiring appropriate action to "*overcome*" language barriers—suggests that the struggle for equal educational opportunities is not necessarily expected to produce immediate, once-for-all-times success. *See Engine Mfrs. Ass'n*, 541 U.S. at 252 (statutory construction should "begin with the language employed by Congress"). Far from requiring "immediate equalization of educational opportunities," the EEOA's stated purpose is to "specify appropriate remedies for the *orderly* removal of the vestiges of the dual school system." 20 U.S.C. § 1701(b) (emphasis added); *see* THE COMPACT OXFORD ENGLISH DICTIONARY 1223 (2d ed. 2000) (orderly: "in due order or regular

succession"). The 1970s-era statute thus recognizes that overcoming language barriers will take time. Under the EEOA, moreover, court-ordered remediation plans may not be imposed until the local agency is provided notice "and given a reasonable opportunity to develop a voluntary remedial plan," with sufficient "time" to enlist "community participation." 20 U.S.C. § 1758. The 1974 statute is not, in short, a rigid mandate; instead, it requires schools to make "a genuine and good faith effort, consistent with local circumstances and resources, to remedy the language deficiencies of their students." *Castaneda*, 648 F.2d at 1009.

The Ninth Circuit is likewise wrong in conceptualizing the two statutes as serving "different purposes." To the contrary, the relevant portions of NCLB and the EEOA both focus on the same underlying objective: ensuring educational opportunities for students not proficient in English. *Compare* 20 U.S.C. § 1703(f) *with* 20 U.S.C. § 6812(2). NCLB thus defines the appropriate steps that States must follow to ensure that ELL students are given the same opportunities as non-ELL students. The statute is expressly designed to ensure that "all limited English proficient children" receive assistance "to achieve at high levels in the core academic subjects so that those children can meet the same challenging State academic content and student academic achievement standards as all children are expected to meet." *Id.* § 6812(2). NCLB thus has the same "equality-based" focus as the EEOA. Indeed, commentators have suggested that NCLB is the "greatest civil rights education

statute that has ever been passed." *Not Getting Left Behind*, WASH. POST, Feb. 5, 2006, at B-06 (quoting John Brattain, Chief Counsel for the Lawyers' Committee for Civil Rights Under Law).

Nor does interpreting the two statutes in harmony impliedly repeal the EEOA or otherwise render it a dead letter. The "task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." *Fausto*, 484 U.S. at 453

So it is here. The EEOA remains a vital protection against civil rights violations. The EEOA's prohibitions against discrimination, deliberate segregation, and forced busing remain largely (if not entirely) unaffected by NCLB. *See* 20 U.S.C. § 1703(a)-(e). Moreover, situations may well arise where, although a State is in compliance with NCLB's mandates, particular schools or school districts engage in individual instances of discrimination for which a court-ordered remedy under the EEOA is "essential" to correct a "particular denial[] of equal educational opportunity." *Id.* § 1712.

But that is far from saying courts may write state-wide remedies on the blank slate of the EEOA's "appropriate action" mandate and in defiance of NCLB's particularized requirements. *See United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1997) (a "specific policy embodied in a later federal statute should control our construction" of a more general, earlier statute). As

long as a State adheres to NCLB's requirements, it does *not* commit an EEOA violation merely because it chooses not to allocate more taxpayer dollars to programs that are already meeting the detailed federal standards that Congress has chosen to enact. Federal courts lack authority to second-guess Congress's judgment as to what is "appropriate," or to proceed by their own lights and mandate sweeping, state-wide funding increases that contravene NCLB's policies favoring flexibility, accountability, and educational outcomes over judicial management, divided control, and funding inputs.

C. The Ninth Circuit's Approach Contravenes Congress's Policy Judgments.

In failing to consider NCLB as a benchmark for "appropriate action," the Ninth Circuit violated the fundamental principle that "legislative not judicial solutions are preferable" in areas where, as here, Congress enjoys superior institutional competence. *Patsy v. Board of Regents*, 457 U.S. 496, 513 (1982). As this Court has emphasized, "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987). By focusing on the EEOA's principal purpose, the Ninth Circuit neglected Congress's other objectives, including its intent to leave "state and local educational authorities a substantial

amount of latitude in choosing the programs and techniques" appropriate "to meet their obligations under the EEOA." *Castaneda*, 648 F.2d at 1009.

Had it properly applied this Court's precedent, the Ninth Circuit would have recognized that the district court's myopic focus on increased funding rests on an antiquated educational theory that runs contrary to Congress's policy judgments.

First, the continuing injunction directly contravenes Congress's policy that state and local officials be given flexibility to implement ELL programs they believe are "most effective." 20 U.S.C. § 6812(9). The lower court's view that Arizona's educational successes will be "fleeting at best" (unless the State commits substantially more taxpayer dollars earmarked for ELL instruction) is precisely the type of judicial micro-management that has failed to improve student performance. *See Missouri*, 515 U.S. at 131 ("[f]ederal courts do not possess the capabilities of state and local governments in addressing educational problems"). The reality is this: educational opportunities will not necessarily improve merely because more dollars are spent. *See* JA 202. Instead, structuring program funding is an essential component of sound education policies. Local officials must be given proper incentives to ensure that dollars are spent wisely. *See Castaneda*, 648 F.2d at 1009 (courts may not "choos[e] between sound but competing theories").

Second, the continuing injunction cannot be reconciled with Congress's decision that the federal government should get out of the business of

dictating specific programmatic inputs and, instead, focus on whether students are achieving objective, measurable educational outcomes. The courts below acknowledged that Nogales's schools have substantially improved, but discounted those improvements by attributing them to the efforts of former Superintendent Kelt Cooper. Pet. App. 36a (noting that he was "able to achieve his reforms with limited resources"); Pet. App. 62a (Nogales "should not be penalized for doing its best to make do"). That dismissive attitude spotlights petitioners' profound disagreement with the courts below. In petitioners' view, educational leadership that wisely deploys available resources is to be celebrated not discounted. Superintendent Cooper improved Nogales's schools by addressing the "shell game" in which schools claim resources they do not need in order to create "built-in slush fund[s]." JA 111-113. He therefore agreed that, before one "can even begin to suggest that money might make a difference," schools must be "clean[ed] up" and turned into "highly managed" and "highly efficient" organizations. JA 122-124 (describing persistent inefficiencies as "parasite[s]" that drain "away resources"). In sum, proper incentives for marshalling resources creates an educational culture of competence that propels rather than retards student achievement.

Third, the continuing injunction cannot be reconciled with Congress's policy determination to meet educational challenges through the structures of the modern administrative state, and its recognition that judges' attempts to dictate preferred policy outcomes are not appropriate. This

structural point is underscored by the Ninth Circuit's narrow understanding of the difficulties involved in creating effective ELL programs. Both the district court and the Ninth Circuit noted a concern that the costs of ELL programming are not fully covered by ELL-specific funds (group B funding) and, therefore, assumed that Nogales must be "dipping into funds that would otherwise be used to fund basic educational purposes." Pet. App. 42a. But that contention overlooks the discretionary nature of group B funding and the fact that schools are not required to spend all group B monies on ELL education. Because group B funds are provided based on the number of students participating in ELL programs, a dramatic increase in group B funds could create perverse incentives for schools to keep ELL students languishing in special-language programs. *See* JA 204-205.

III. The Court Should Direct The Restoration Of Local Control Over Arizona's Schools.

The lower courts have stepped outside the proper federal judicial role and, in presuming "to have the institutional ability to set effective educational" and "budgetary" policy, have transformed the judiciary from "the least dangerous branch into the most dangerous one." *Missouri*, 515 U.S. at 132. To draw this long intrusion into the prerogatives of Arizona's local officials to a close, this Court should vacate the district court's injunction without remanding for further proceedings.

It is undisputed that the district court's funding mandate provides the *only* basis for its

continuing injunction. Pet. App. 69a; Cert. Opp. 28. Because the district court's funding mandate is unlawful, the injunction should be vacated without occasioning a remand for further proceedings. *See Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish County*, 128 S. Ct. 2733, 2745 (2008) (remand not appropriate if it would be "an idle and useless formality"). Moreover, even if the district court's funding mandate were not invalid as a matter of law, the factual record is adequate to resolve the issues on review. *See Thigpen v. Roberts*, 468 U.S. 27, 32 (1984). The extensive record evidence establishes that Arizona is taking appropriate action to overcome language barriers. In addition, the Department of Education can remedy any failures to comply with federal law; thus, no additional judicial remedy is "essential." 20 U.S.C. § 1712.

Further litigation at this juncture would mostly serve to impose unnecessary burdens on Arizona's schools, sapping the energy and flexibility of school administrators and further draining the public fisc in a period of strained finances. *See Missouri*, 515 U.S. at 131. As this Court has long recognized, "[l]ocal control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs." *Dowell*, 498 U.S. at 248. Local autonomy of "school districts is a vital national tradition." *Dayton*, 433 U.S. at 410. Because local autonomy is "essential both to the maintenance of community concern and support for public schools and to the quality of the educational process," it is hard to discern how much damage

has been caused by the district court's invasive (and expensive) approach. *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974). After eight long years, however, it is clear that no justification exists for continuing the judiciary's intrusion into Arizona's local institutions.

In the end, this case boils down to the fact that the courts below remain mired in the past. Continuing to rely on outdated notions of education reform, the lower courts hark back to an era when well-meaning officials blindly threw scarce resources at problems, but then did little to ensure commensurate (or any) improvements in student performance. Arizona's Legislature is resisting this entrenched thinking that demands additional financial resources, but is unwilling to require accountability or make difficult policy choices—the leadership needed to inspire and serve Arizona's schoolchildren. The appropriate actions that Arizona has taken over the last eight years to aid its non-English-speaking students should be given a chance to succeed.

CONCLUSION

For the foregoing reasons, the Court should reverse the Ninth Circuit's decision below and direct the vacatur of the district court's injunction.

Respectfully submitted,

RICK RICHMOND
CHRISTOPHER C. CHIOU
STEVEN A. HASKINS
KYLE T. CUTTS
KIRKLAND & ELLIS LLP
777 South Figueroa St.
Los Angeles, CA 90017
(213) 680-8400

KENNETH W. STARR
Counsel of Record
KIRKLAND & ELLIS LLP
777 South Figueroa St.
Los Angeles, CA 90017
(213) 680-8400

DAVID J. CANTELME
D. AARON BROWN
PAUL R. NEIL
CANTELME & BROWN, PLC
3030 N. Central Avenue
Phoenix, AZ 85102
(602) 200-0104

ASHLEY C. PARRISH
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000

Counsel for Petitioners

February 19, 2009

ADDENDUM

TABLE OF CONTENTS

Fed. R. Civ. P. 60(b) Add-2
20 U.S.C. § 1703 ..... Add-3
20 U.S.C. § 1712 ..... Add-4
20 U.S.C. § 1713 ..... Add-5
20 U.S.C. § 1758 ..... Add-6
20 U.S.C. § 6311 ..... Add-7
20 U.S.C. § 6812 ..... Add-44
20 U.S.C. § 6842 ..... Add-47

Federal Rules of Civil Procedure

Rule 60. Relief from a Judgment or Order

* * *

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

1. mistake, inadvertence, surprise, or excusable neglect;

2. newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

3. fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

4. the judgment is void;

5. the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

6. any other reason that justifies relief.

* * *

20 U.S.C. § 1703

§ 1703. Denial of equal education opportunity prohibited

No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—

(a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;

(b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps, consistent with part 4 of this subchapter, to remove the vestiges of a dual school system;

(c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student;

(d) discrimination by an educational agency on the basis of race, color, or national origin in the employment, employment conditions, or assignment to schools of its faculty or staff, except to fulfill the purposes of subsection (f) below;

(e) the transfer by an educational agency, whether voluntary or otherwise, of a student from one school to another if the purpose and effect of such transfer is to increase segregation of students on the basis of race, color, or national origin among the schools of such agency; or

(f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

* * *

20 U.S.C. § 1712

§ 1712. Formulating remedies; applicability

In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court, department, or agency of the United States shall seek or impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws

* * *

20 U.S.C. § 1713

§ 1713. Priority of remedies

In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, which may involve directly or indirectly the transportation of students, a court, department, or agency of the United States shall consider and make specific findings on the efficacy in correcting such denial of the following remedies and shall require implementation of the first of the remedies set out below, or of the first combination thereof which would remedy such denial:

(a) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account school capacities and natural physical barriers;

(b) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account only school capacities;

(c) permitting students to transfer from a school in which a majority of the students are of their race, color, or national origin to a school in which a minority of the students are of their race, color, or national origin;

(d) the creation or revision of attendance zones or grade structures without requiring transportation beyond that described in section 1714 of this title;

(e) the construction of new schools or the closing of inferior schools;

(f) the construction or establishment of magnet schools; or

(g) the development and implementation of any other plan which is educationally sound and administratively feasible, subject to the provisions of sections 1714 and 1715 of this title.

* * *

20 U.S.C. § 1758

§ 1758. Reasonable time for developing voluntary school desegregation plans following detailed notice of violations

Notwithstanding any other law or provision of law, no court or officer of the United States shall enter, as a remedy for a denial of equal educational opportunity or a denial of equal protection of the laws, any order for enforcement of a plan of desegregation or modification of a court-approved plan, until such time as the local educational agency to be affected by such order has been provided notice of the details of the violation and given a reasonable opportunity to develop a voluntary remedial plan. Such time shall permit the local educational agency sufficient opportunity for community participation in the development of a remedial plan.

* * *

20 U.S.C. § 6311

§ 6311. State Plans

(a) Plans required

(1) In general

For any State desiring to receive a grant under this part, the State educational agency shall submit to the Secretary a plan, developed by the State educational agency, in consultation with local educational agencies, teachers, principals, pupil services personnel, administrators (including administrators of programs described in other parts of this subchapter), other staff, and parents, that satisfies the requirements of this section and that is coordinated with other programs under this chapter, the Individuals with Disabilities Education Act, the Carl D. Perkins Career and Technical Education Act of 2006, the Head Start Act, the Adult Education and Family Literacy Act, and the McKinney-Vento Homeless Assistance Act.

(2) Consolidated plan

A State plan submitted under paragraph (1) may be submitted as part of a consolidated plan under section 7842 of this title.

(b) Academic standards, academic assessments, and accountability

(1) Challenging academic standards

(A) In general

Each State plan shall demonstrate that the State has adopted challenging academic content standards and challenging student academic achievement standards that will be used by the

State, its local educational agencies, and its schools to carry out this part, except that a State shall not be required to submit such standards to the Secretary.

(B) Same standards

The academic standards required by subparagraph (A) shall be the same academic standards that the State applies to all schools and children in the State.

(C) Subjects

The State shall have such academic standards for all public elementary school and secondary school children, including children served under this part, in subjects determined by the State, but including at least mathematics, reading or language arts, and (beginning in the 2005-2006 school year) science, which shall include the same knowledge, skills, and levels of achievement expected of all children.

(D) Challenging academic standards

Standards under this paragraph shall include—

(i) challenging academic content standards in academic subjects that—

(I) specify what children are expected to know and be able to do;

(II) contain coherent and rigorous content; and

(III) encourage the teaching of advanced skills; and

(ii) challenging student academic achievement standards that—

(I) are aligned with the State's academic content standards;

(II) describe two levels of high achievement (proficient and advanced) that determine how well children are mastering the material in the State academic content standards; and

(III) describe a third level of achievement (basic) to provide complete information about the progress of the lower-achieving children toward mastering the proficient and advanced levels of achievement.

(E) Information

For the subjects in which students will be served under this part, but for which a State is not required by subparagraphs (A), (B), and (C) to develop, and has not otherwise developed, such academic standards, the State plan shall describe a strategy for ensuring that students are taught the same knowledge and skills in such subjects and held to the same expectations as are all children.

(F) Existing standards

Nothing in this part shall prohibit a State from revising, consistent with this section, any standard adopted under this part before or after January 8, 2002.

(2) Accountability

(A) In general

Each State plan shall demonstrate that the State has developed and is implementing a single, statewide State accountability system that will be effective in ensuring that all local educational

agencies, public elementary schools, and public secondary schools make adequate yearly progress as defined under this paragraph. Each State accountability system shall—

(i) be based on the academic standards and academic assessments adopted under paragraphs (1) and (3), and other academic indicators consistent with subparagraph (C)(vi) and (vii), and shall take into account the achievement of all public elementary school and secondary school students;

(ii) be the same accountability system the State uses for all public elementary schools and secondary schools or all local educational agencies in the State, except that public elementary schools, secondary schools, and local educational agencies not participating under this part are not subject to the requirements of section 6316 of this title; and

(iii) include sanctions and rewards, such as bonuses and recognition, the State will use to hold local educational agencies and public elementary schools and secondary schools accountable for student achievement and for ensuring that they make adequate yearly progress in accordance with the State's definition under subparagraphs (B) and (C).

(B) Adequate yearly progress

Each State plan shall demonstrate, based on academic assessments described in paragraph (3), and in accordance with this paragraph, what constitutes adequate yearly progress of the State, and of all public elementary schools, secondary schools, and local educational agencies in the State,

toward enabling all public elementary school and secondary school students to meet the State's student academic achievement standards, while working toward the goal of narrowing the achievement gaps in the State, local educational agencies, and schools.

(C) Definition

"Adequate yearly progress" shall be defined by the State in a manner that—

(i) applies the same high standards of academic achievement to all public elementary school and secondary school students in the State;

(ii) is statistically valid and reliable;

(iii) results in continuous and substantial academic improvement for all students;

(iv) measures the progress of public elementary schools, secondary schools and local educational agencies and the State based primarily on the academic assessments described in paragraph (3);

(v) includes separate measurable annual objectives for continuous and substantial improvement for each of the following:

(I) The achievement of all public elementary school and secondary school students.

(II) The achievement of—

(aa) economically disadvantaged students;

(bb) students from major racial and ethnic groups;

(cc) students with disabilities; and

(dd) students with limited English proficiency;

except that disaggregation of data under subclause (II) shall not be required in a case in which the number of students in a category is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student;

(vi) in accordance with subparagraph (D), includes graduation rates for public secondary school students (defined as the percentage of students who graduate from secondary school with a regular diploma in the standard number of years) and at least one other academic indicator, as determined by the State for all public elementary school students; and

(vii) in accordance with subparagraph (D), at the State's discretion, may also include other academic indicators, as determined by the State for all public school students, measured separately for each group described in clause (v), such as achievement on additional State or locally administered assessments, decreases in grade-to-grade retention rates, attendance rates, and changes in the percentages of students completing gifted and talented, advanced placement, and college preparatory courses.

(D) Requirements for other indicators

In carrying out subparagraph (C)(vi) and (vii), the State—

(i) shall ensure that the indicators described in those provisions are valid and reliable, and are

consistent with relevant, nationally recognized professional and technical standards, if any; and

(ii) except as provided in subparagraph (I)(i), may not use those indicators to reduce the number of, or change, the schools that would otherwise be subject to school improvement, corrective action, or restructuring under section 6316 of this title if those additional indicators were not used, but may use them to identify additional schools for school improvement or in need of corrective action or restructuring.

(E) Starting point

Each State, using data for the 2001-2002 school year, shall establish the starting point for measuring, under subparagraphs (G) and (H), the percentage of students meeting or exceeding the State's proficient level of academic achievement on the State assessments under paragraph (3) and pursuant to the timeline described in subparagraph (F). The starting point shall be, at a minimum, based on the higher of the percentage of students at the proficient level who are in—

(i) the State's lowest achieving group of students described in subparagraph (C)(v)(II); or

(ii) the school at the 20th percentile in the State, based on enrollment, among all schools ranked by the percentage of students at the proficient level.

(F) Timeline

Each State shall establish a timeline for adequate yearly progress. The timeline shall ensure that not later than 12 years after the end of the 2001-2002

school year, all students in each group described in subparagraph (C)(v) will meet or exceed the State's proficient level of academic achievement on the State assessments under paragraph (3).

(G) Measurable objectives

Each State shall establish statewide annual measurable objectives, pursuant to subparagraph (C)(v), for meeting the requirements of this paragraph, and which—

(i) shall be set separately for the assessments of mathematics and reading or language arts under subsection (a)(3);

(ii) shall be the same for all schools and local educational agencies in the State;

(iii) shall identify a single minimum percentage of students who are required to meet or exceed the proficient level on the academic assessments that applies separately to each group of students described in subparagraph (C)(v);

(iv) shall ensure that all students will meet or exceed the State's proficient level of academic achievement on the State assessments within the State's timeline under subparagraph (F); and

(v) may be the same for more than 1 year, subject to the requirements of subparagraph (H).

(H) Intermediate goals for annual yearly progress

Each State shall establish intermediate goals for meeting the requirements, including the measurable objectives in subparagraph (G), of this paragraph and that shall—

(i) increase in equal increments over the period covered by the State's timeline under subparagraph (F);

(ii) provide for the first increase to occur in not more than 2 years; and

(iii) provide for each following increase to occur in not more than 3 years.

(I) Annual improvement for schools

Each year, for a school to make adequate yearly progress under this paragraph—

(i) each group of students described in subparagraph (C)(v) must meet or exceed the objectives set by the State under subparagraph (G), except that if any group described in subparagraph (C)(v) does not meet those objectives in any particular year, the school shall be considered to have made adequate yearly progress if the percentage of students in that group who did not meet or exceed the proficient level of academic achievement on the State assessments under paragraph (3) for that year decreased by 10 percent of that percentage from the preceding school year and that group made progress on one or more of the academic indicators described in subparagraph (C)(vi) or (vii); and

(ii) not less than 95 percent of each group of students described in subparagraph (C)(v) who are enrolled in the school are required to take the assessments, consistent with paragraph (3)(C)(xi) and with accommodations, guidelines, and alternative assessments provided in the same manner as those provided under section

612(a)(16)(A) of the Individuals with Disabilities Education Act [20 U.S.C. 1412(a)(16)(A)] and paragraph (3), on which adequate yearly progress is based (except that the 95 percent requirement described in this clause shall not apply in a case in which the number of students in a category is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student).

(J) Uniform averaging procedure

For the purpose of determining whether schools are making adequate yearly progress, the State may establish a uniform procedure for averaging data which includes one or more of the following:

(i) The State may average data from the school year for which the determination is made with data from one or two school years immediately preceding that school year.

(ii) Until the assessments described in paragraph (3) are administered in such manner and time to allow for the implementation of the uniform procedure for averaging data described in clause (i), the State may use the academic assessments that were required under paragraph (3) as that paragraph was in effect on the day preceding January 8, 2002, provided that nothing in this clause shall be construed to undermine or delay the determination of adequate yearly progress, the requirements of section 6316 of this title, or the implementation of assessments under this section.

(iii) The State may use data across grades in a school.

(K) Accountability for charter schools

The accountability provisions under this chapter shall be overseen for charter schools in accordance with State charter school law.

(3) Academic assessments

(A) In general

Each State plan shall demonstrate that the State educational agency, in consultation with local educational agencies, has implemented a set of high-quality, yearly student academic assessments that include, at a minimum, academic assessments in mathematics, reading or language arts, and science that will be used as the primary means of determining the yearly performance of the State and of each local educational agency and school in the State in enabling all children to meet the State's challenging student academic achievement standards, except that no State shall be required to meet the requirements of this part relating to science assessments until the beginning of the 2007-2008 school year.

(B) Use of assessments

Each State educational agency may incorporate the data from the assessments under this paragraph into a State-developed longitudinal data system that links student test scores, length of enrollment, and graduation records over time.

(C) Requirements

Such assessments shall—

(i) be the same academic assessments used to measure the achievement of all children;

(ii) be aligned with the State's challenging academic content and student academic achievement standards, and provide coherent information about student attainment of such standards;

(iii) be used for purposes for which such assessments are valid and reliable, and be consistent with relevant, nationally recognized professional and technical standards;

(iv) be used only if the State educational agency provides to the Secretary evidence from the test publisher or other relevant sources that the assessments used are of adequate technical quality for each purpose required under this chapter and are consistent with the requirements of this section, and such evidence is made public by the Secretary upon request;

(v) (I) except as otherwise provided for grades 3 through 8 under clause vii, measure the proficiency of students in, at a minimum, mathematics and reading or language arts, and be administered not less than once during—

(aa) grades 3 through 5;

(bb) grades 6 through 9; and

(cc) grades 10 through 12;

(II) beginning not later than school year 2007-2008, measure the proficiency of all students in science and be administered not less than one time during—

(aa) grades 3 through 5;

(bb) grades 6 through 9; and

(cc) grades 10 through 12;

(vi) involve multiple up-to-date measures of student academic achievement, including measures that assess higher-order thinking skills and understanding;

(vii) beginning not later than school year 2005-2006, measure the achievement of students against the challenging State academic content and student academic achievement standards in each of grades 3 through 8 in, at a minimum, mathematics, and reading or language arts, except that the Secretary may provide the State 1 additional year if the State demonstrates that exceptional or uncontrollable circumstances, such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State, prevented full implementation of the academic assessments by that deadline and that the State will complete implementation within the additional 1-year period;

(viii) at the discretion of the State, measure the proficiency of students in academic subjects not described in clauses (v), (vi), (vii) in which the State has adopted challenging academic content and academic achievement standards;

(ix) provide for—

(I) the participation in such assessments of all students;

(II) the reasonable adaptations and accommodations for students with disabilities (as defined under section 602(3) of the Individuals with Disabilities Education Act [20 U.S.C. 1401(3)]) necessary to measure the academic achievement of such students relative to State academic content and State student academic achievement standards; and

(III) the inclusion of limited English proficient students, who shall be assessed in a valid and reliable manner and provided reasonable accommodations on assessments administered to such students under this paragraph, including, to the extent practicable, assessments in the language and form most likely to yield accurate data on what such students know and can do in academic content areas, until such students have achieved English language proficiency as determined under paragraph (7);

(x) notwithstanding subclause (III), the academic assessment (using tests written in English) of reading or language arts of any student who has attended school in the United States (not including Puerto Rico) for three or more consecutive school years, except that if the local educational agency determines, on a case-by-case individual basis, that academic assessments in another language or form would likely yield more accurate and reliable information on what such student knows and can do, the local educational agency may make a determination to assess such student in the appropriate language other than English for a period that does not exceed two additional consecutive years, provided that such

student has not yet reached a level of English language proficiency sufficient to yield valid and reliable information on what such student knows and can do on tests (written in English) of reading or language arts;

(xi) include students who have attended schools in a local educational agency for a full academic year but have not attended a single school for a full academic year, except that the performance of students who have attended more than 1 school in the local educational agency in any academic year shall be used only in determining the progress of the local educational agency;

(xii) produce individual student interpretive, descriptive, and diagnostic reports, consistent with clause (iii) that allow parents, teachers, and principals to understand and address the specific academic needs of students, and include information regarding achievement on academic assessments aligned with State academic achievement standards, and that are provided to parents, teachers, and principals, as soon as is practicably possible after the assessment is given, in an understandable and uniform format, and to the extent practicable, in a language that parents can understand;

(xiii) enable results to be disaggregated within each State, local educational agency, and school by gender, by each major racial and ethnic group, by English proficiency status, by migrant status, by students with disabilities as compared to nondisabled students, and by economically disadvantaged students as compared to students

who are not economically disadvantaged, except that, in the case of a local educational agency or a school, such disaggregation shall not be required in a case in which the number of students in a category is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student;

(xiv) be consistent with widely accepted professional testing standards, objectively measure academic achievement, knowledge, and skills, and be tests that do not evaluate or assess personal or family beliefs and attitudes, or publicly disclose personally identifiable information; and

(xv) enable itemized score analyses to be produced and reported, consistent with clause (iii), to local educational agencies and schools, so that parents, teachers, principals, and administrators can interpret and address the specific academic needs of students as indicated by the students' achievement on assessment items.

(D) Deferral

A State may defer the commencement, or suspend the administration, but not cease the development, of the assessments described in this paragraph, that were not required prior to January 8, 2002, for 1 year for each year for which the amount appropriated for grants under section 7301b(a)(2) of this title is less than—

(i) $370,000,000 for fiscal year 2002;

(ii) $380,000,000 for fiscal year 2003;

(iii) $390,000,000 for fiscal year 2004; and

(iv) $400,000,000 for fiscal years 2005 through 2007.

(4) Special rule

Academic assessment measures in addition to those in paragraph (3) that do not meet the requirements of such paragraph may be included in the assessment under paragraph (3) as additional measures, but may not be used in lieu of the academic assessments required under paragraph (3). Such additional assessment measures may not be used to reduce the number of or change, the schools that would otherwise be subject to school improvement, corrective action, or restructuring under section 6316 of this title if such additional indicators were not used, but may be used to identify additional schools for school improvement or in need of corrective action or restructuring except as provided in paragraph (2)(I)(i).

(5) State authority

If a State educational agency provides evidence, which is satisfactory to the Secretary, that neither the State educational agency nor any other State government official, agency, or entity has sufficient authority, under State law, to adopt curriculum content and student academic achievement standards, and academic assessments aligned with such academic standards, which will be applicable to all students enrolled in the State's public elementary schools and secondary schools, then the State educational agency may meet the requirements of this subsection by—

(A) adopting academic standards and academic assessments that meet the requirements of this

subsection, on a statewide basis, and limiting their applicability to students served under this part; or

(B) adopting and implementing policies that ensure that each local educational agency in the State that receives grants under this part will adopt curriculum content and student academic achievement standards, and academic assessments aligned with such standards, which—

(i) meet all of the criteria in this subsection and any regulations regarding such standards and assessments that the Secretary may publish; and

(ii) are applicable to all students served by each such local educational agency.

(6) Language assessments

Each State plan shall identify the languages other than English that are present in the participating student population and indicate the languages for which yearly student academic assessments are not available and are needed. The State shall make every effort to develop such assessments and may request assistance from the Secretary if linguistically accessible academic assessment measures are needed. Upon request, the Secretary shall assist with the identification of appropriate academic assessment measures in the needed languages, but shall not mandate a specific academic assessment or mode of instruction.

(7) Academic assessments of English language proficiency

Each State plan shall demonstrate that local educational agencies in the State will, beginning not later than school year 2002-2003, provide for an

annual assessment of English proficiency (measuring students' oral language, reading, and writing skills in English) of all students with limited English proficiency in the schools served by the State educational agency, except that the Secretary may provide the State 1 additional year if the State demonstrates that exceptional or uncontrollable circumstances, such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State, prevented full implementation of this paragraph by that deadline and that the State will complete implementation within the additional 1-year period.

(8) Requirement

Each State plan shall describe—

(A) how the State educational agency will assist each local educational agency and school affected by the State plan to develop the capacity to comply with each of the requirements of sections 6312(c)(1)(D), 6314(b), and 6315(c) of this title that is applicable to such agency or school;

(B) how the State educational agency will assist each local educational agency and school affected by the State plan to provide additional educational assistance to individual students assessed as needing help to achieve the State's challenging academic achievement standards;

(C) the specific steps the State educational agency will take to ensure that both schoolwide programs and targeted assistance schools provide instruction by highly qualified instructional staff as required by sections 6314(b)(1)(C) and 6315(c)(1)(E) of this title, including steps that the State educational

agency will take to ensure that poor and minority children are not taught at higher rates than other children by inexperienced, unqualified, or out-of-field teachers, and the measures that the State educational agency will use to evaluate and publicly report the progress of the State educational agency with respect to such steps;

(D) an assurance that the State educational agency will assist local educational agencies in developing or identifying high-quality effective curricula aligned with State academic achievement standards and how the State educational agency will disseminate such curricula to each local educational agency and school within the State; and

(E) such other factors the State educational agency determines appropriate to provide students an opportunity to achieve the knowledge and skills described in the challenging academic content standards adopted by the State.

(9) Factors affecting student achievement

Each State plan shall include an assurance that the State educational agency will coordinate and collaborate, to the extent feasible and necessary as determined by the State educational agency, with agencies providing services to children, youth, and families, with respect to local educational agencies within the State that are identified under section 6316 of this title and that request assistance with addressing major factors that have significantly affected the academic achievement of students in the local educational agency or schools served by such agency.

(10) Use of academic assessment results to improve student academic achievement

Each State plan shall describe how the State educational agency will ensure that the results of the State assessments described in paragraph (3)—

(A) will be promptly provided to local educational agencies, schools, and teachers in a manner that is clear and easy to understand, but not later than before the beginning of the next school year; and

(B) be used by those local educational agencies, schools, and teachers to improve the educational achievement of individual students.

(c) Other provisions to support teaching and learning

Each State plan shall contain assurances that—

(1) the State educational agency will meet the requirements of subsection (h)(1) and, beginning with the 2002-2003 school year, will produce the annual State report cards described in such subsection, except that the Secretary may provide the State educational agency 1 additional year if the State educational agency demonstrates that exceptional or uncontrollable circumstances, such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State, prevented full implementation of this paragraph by that deadline and that the State will complete implementation within the additional 1-year period;

(2) the State will, beginning in school year 2002-2003, participate in biennial State academic assessments of 4th and 8th grade reading and

mathematics under the National Assessment of Educational Progress carried out under section 9622(b)(2) of this title if the Secretary pays the costs of administering such assessments;

(3) the State educational agency, in consultation with the Governor, will include, as a component of the State plan, a plan to carry out the responsibilities of the State under sections 6316 and 6317 of this title, including carrying out the State educational agency's statewide system of technical assistance and support for local educational agencies;

(4) the State educational agency will work with other agencies, including educational service agencies or other local consortia, and institutions to provide technical assistance to local educational agencies and schools, including technical assistance in providing professional development under section 6319 of this title, technical assistance under section 6317 of this title, and technical assistance relating to parental involvement under section 6318 of this title;

(5) (A) where educational service agencies exist, the State educational agency will consider providing professional development and technical assistance through such agencies; and

(B) where educational service agencies do not exist, the State educational agency will consider providing professional development and technical assistance through other cooperative agreements such as through a consortium of local educational agencies;

(6) the State educational agency will notify local educational agencies and the public of the content and student academic achievement standards and academic assessments developed under this section, and of the authority to operate schoolwide programs, and will fulfill the State educational agency's responsibilities regarding local educational agency improvement and school improvement under section 6316 of this title, including such corrective actions as are necessary;

(7) the State educational agency will provide the least restrictive and burdensome regulations for local educational agencies and individual schools participating in a program assisted under this part;

(8) the State educational agency will inform the Secretary and the public of how Federal laws, if at all, hinder the ability of States to hold local educational agencies and schools accountable for student academic achievement;

(9) the State educational agency will encourage schools to consolidate funds from other Federal, State, and local sources for schoolwide reform in schoolwide programs under section 6314 of this title;

(10) the State educational agency will modify or eliminate State fiscal and accounting barriers so that schools can easily consolidate funds from other Federal, State, and local sources for schoolwide programs under section 6314 of this title;

(11) the State educational agency has involved the committee of practitioners established under section 6573(b) of this title in developing the plan and monitoring its implementation;

(12) the State educational agency will inform local educational agencies in the State of the local educational agency's authority to transfer funds under subchapter VI of this chapter, to obtain waivers under part D of subchapter IX of this chapter, and, if the State is an Ed-Flex Partnership State, to obtain waivers under the Education Flexibility Partnership Act of 1999;

(13) the State educational agency will coordinate activities funded under this part with other Federal activities as appropriate; and

(14) the State educational agency will encourage local educational agencies and individual schools participating in a program assisted under this part to offer family literacy services (using funds under this part), if the agency or school determines that a substantial number of students served under this part by the agency or school have parents who do not have a secondary school diploma or its recognized equivalent or who have low levels of literacy.

(d) Parental involvement

Each State plan shall describe how the State educational agency will support the collection and dissemination to local educational agencies and schools of effective parental involvement practices. Such practices shall—

(1) be based on the most current research that meets the highest professional and technical standards, on effective parental involvement that fosters achievement to high standards for all children; and

(2) be geared toward lowering barriers to greater participation by parents in school planning, review, and improvement experienced.

(e) Peer review and secretarial approval

(1) Secretarial duties

The Secretary shall—

(A) establish a peer-review process to assist in the review of State plans;

(B) appoint individuals to the peer-review process who are representative of parents, teachers, State educational agencies, and local educational agencies, and who are familiar with educational standards, assessments, accountability, the needs of low-performing schools, and other educational needs of students;

(C) approve a State plan within 120 days of its submission unless the Secretary determines that the plan does not meet the requirements of this section;

(D) if the Secretary determines that the State plan does not meet the requirements of subsection (a), (b), or (c) of this section, immediately notify the State of such determination and the reasons for such determination;

(E) not decline to approve a State's plan before—

(i) offering the State an opportunity to revise its plan;

(ii) providing technical assistance in order to assist the State to meet the requirements of subsections (a), (b), and (c) of this section; and

(iii) providing a hearing; and

(F) have the authority to disapprove a State plan for not meeting the requirements of this part, but shall not have the authority to require a State, as a condition of approval of the State plan, to include in, or delete from, such plan one or more specific elements of the State's academic content standards or to use specific academic assessment instruments or items.

(2) State revisions

A State plan shall be revised by the State educational agency if it is necessary to satisfy the requirements of this section.

(f) Duration of the plan

(1) In general

Each State plan shall—

(A) remain in effect for the duration of the State's participation under this part; and

(B) be periodically reviewed and revised as necessary by the State educational agency to reflect changes in the State's strategies and programs under this part.

(2) Additional information

If significant changes are made to a State's plan, such as the adoption of new State academic content standards and State student achievement standards, new academic assessments, or a new definition of adequate yearly progress, such information shall be submitted to the Secretary.

(g) Penalties

(1) Failure to meet deadlines enacted in 1994

(A) In general

If a State fails to meet the deadlines established by the Improving America's Schools Act of 1994 (or under any waiver granted by the Secretary or under any compliance agreement with the Secretary) for demonstrating that the State has in place challenging academic content standards and student achievement standards, and a system for measuring and monitoring adequate yearly progress, the Secretary shall withhold 25 percent of the funds that would otherwise be available to the State for State administration and activities under this part in each year until the Secretary determines that the State meets those requirements.

(B) No extension

Notwithstanding any other provision of law, 90 days after January 8, 2002, the Secretary shall not grant any additional waivers of, or enter into any additional compliance agreements to extend, the deadlines described in subparagraph (A) for any State.

(2) Failure to meet requirements enacted in 2001

If a State fails to meet any of the requirements of this section, other than the requirements described in paragraph (1), then the Secretary may withhold funds for State administration under this part until the Secretary determines that the State has fulfilled those requirements.

(h) Reports

(1) Annual State report card

(A) In general

Not later than the beginning of the 2002-2003 school year, unless the State has received a 1-year extension pursuant to subsection (c)(1) of this section, a State that receives assistance under this part shall prepare and disseminate an annual State report card.

(B) Implementation

The State report card shall be—

(i) concise; and

(ii) presented in an understandable and uniform format and, to the extent practicable, provided in a language that the parents can understand.

(C) Required information

The State shall include in its annual State report card—

(i) information, in the aggregate, on student achievement at each proficiency level on the State academic assessments described in subsection (b)(3) of this section (disaggregated by race, ethnicity, gender, disability status, migrant status, English proficiency, and status as economically disadvantaged, except that such disaggregation shall not be required in a case in which the number of students in a category is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student);

(ii) information that provides a comparison between the actual achievement levels of each group of students described in subsection (b)(2)(C)(v) of this section and the State's annual measurable objectives for each such group of students on each of the academic assessments required under this part;

(iii) the percentage of students not tested (disaggregated by the same categories and subject to the same exception described in clause (i));

(iv) the most recent 2-year trend in student achievement in each subject area, and for each grade level, for which assessments under this section are required;

(v) aggregate information on any other indicators used by the State to determine the adequate yearly progress of students in achieving State academic achievement standards;

(vi) graduation rates for secondary school students consistent with subsection (b)(2)(C)(vi) of this section;

(vii) information on the performance of local educational agencies in the State regarding making adequate yearly progress, including the number and names of each school identified for school improvement under section 6316 of this title; and

(viii) the professional qualifications of teachers in the State, the percentage of such teachers teaching with emergency or provisional credentials, and the percentage of classes in the State not taught by highly qualified teachers, in the aggregate and disaggregated by high-poverty

compared to low-poverty schools which, for the purpose of this clause, means schools in the top quartile of poverty and the bottom quartile of poverty in the State.

(D) Optional information

The State may include in its annual State report card such other information as the State believes will best provide parents, students, and other members of the public with information regarding the progress of each of the State's public elementary schools and public secondary schools. Such information may include information regarding—

(i) school attendance rates;

(ii) average class size in each grade;

(iii) academic achievement and gains in English proficiency of limited English proficient students;

(iv) the incidence of school violence, drug abuse, alcohol abuse, student suspensions, and student expulsions;

(v) the extent and type of parental involvement in the schools;

(vi) the percentage of students completing advanced placement courses, and the rate of passing of advanced placement tests; and

(vii) a clear and concise description of the State's accountability system, including a description of the criteria by which the State evaluates school performance, and the criteria that the State has established, consistent with

subsection (b)(2) of this section, to determine the status of schools regarding school improvement, corrective action, and restructuring.

(2) Annual local educational agency report cards

(A) Report cards

(i) In general

Not later than the beginning of the 2002-2003 school year, a local educational agency that receives assistance under this part shall prepare and disseminate an annual local educational agency report card, except that the State educational agency may provide the local educational agency 1 additional year if the local educational agency demonstrates that exceptional or uncontrollable circumstances, such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the local educational agency, prevented full implementation of this paragraph by that deadline and that the local educational agency will complete implementation within the additional 1-year period.

(ii) Special rule

If a State educational agency has received an extension pursuant to subsection (c)(1) of this section, then a local educational agency within that State shall not be required to include the information required under paragraph (1)(C) in such report card during such extension.

(B) Minimum requirements

The State educational agency shall ensure that each local educational agency collects appropriate

data and includes in the local educational agency's annual report the information described in paragraph (1)(C) as applied to the local educational agency and each school served by the local educational agency, and—

(i) in the case of a local educational agency—

(I) the number and percentage of schools identified for school improvement under section 6316(c) of this title and how long the schools have been so identified; and

(II) information that shows how students served by the local educational agency achieved on the statewide academic assessment compared to students in the State as a whole; and

(ii) in the case of a school—

(I) whether the school has been identified for school improvement; and

(II) information that shows how the school's students achievement on the statewide academic assessments and other indicators of adequate yearly progress compared to students in the local educational agency and the State as a whole.

(C) Other information

A local educational agency may include in its annual local educational agency report card any other appropriate information, whether or not such information is included in the annual State report card.

(D) Data

A local educational agency or school shall only include in its annual local educational agency

report card data that are sufficient to yield statistically reliable information, as determined by the State, and that do not reveal personally identifiable information about an individual student.

(E) Public dissemination

The local educational agency shall, not later than the beginning of the 2002-2003 school year, unless the local educational agency has received a 1-year extension pursuant to subparagraph (A), publicly disseminate the information described in this paragraph to all schools in the school district served by the local educational agency and to all parents of students attending those schools in an understandable and uniform format and, to the extent practicable, provided in a language that the parents can understand, and make the information widely available through public means, such as posting on the Internet, distribution to the media, and distribution through public agencies, except that if a local educational agency issues a report card for all students, the local educational agency may include the information under this section as part of such report.

(3) Preexisting report cards

A State educational agency or local educational agency that was providing public report cards on the performance of students, schools, local educational agencies, or the State prior to January 8, 2002, may use those report cards for the purpose of this subsection, so long as any such report card is modified, as may be needed, to contain the information required by this subsection.

(4) Annual State report to the Secretary

Each State educational agency receiving assistance under this part shall report annually to the Secretary, and make widely available within the State—

(A) beginning with school year 2002-2003, information on the State's progress in developing and implementing the academic assessments described in subsection (b)(3) of this section;

(B) beginning not later than school year 2002-2003, information on the achievement of students on the academic assessments required by subsection (b)(3) of this section, including the disaggregated results for the categories of students identified in subsection (b)(2)(C)(v) of this section;

(C) in any year before the State begins to provide the information described in subparagraph (B), information on the results of student academic assessments (including disaggregated results) required under this section;

(D) beginning not later than school year 2002-2003, unless the State has received an extension pursuant to subsection (c)(1) of this section, information on the acquisition of English proficiency by children with limited English proficiency;

(E) the number and names of each school identified for school improvement under section 6316(c) of this title, the reason why each school was so identified, and the measures taken to address the achievement problems of such schools;

(F) the number of students and schools that participated in public school choice and supplemental service programs and activities under this subchapter; and

(G) beginning not later than the 2002-2003 school year, information on the quality of teachers and the percentage of classes being taught by highly qualified teachers in the State, local educational agency, and school.

(5) Report to Congress

The Secretary shall transmit annually to the Committee on Education and the Workforce of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate a report that provides national and State-level data on the information collected under paragraph (4).

(6) Parents right-to-know

(A) Qualifications

At the beginning of each school year, a local educational agency that receives funds under this part shall notify the parents of each student attending any school receiving funds under this part that the parents may request, and the agency will provide the parents on request (and in a timely manner), information regarding the professional qualifications of the student's classroom teachers, including, at a minimum, the following:

(i) Whether the teacher has met State qualification and licensing criteria for the grade levels and subject areas in which the teacher provides instruction.

(ii) Whether the teacher is teaching under emergency or other provisional status through which State qualification or licensing criteria have been waived.

(iii) The baccalaureate degree major of the teacher and any other graduate certification or degree held by the teacher, and the field of discipline of the certification or degree.

(iv) Whether the child is provided services by paraprofessionals and, if so, their qualifications.

(B) Additional information

In addition to the information that parents may request under subparagraph (A), a school that receives funds under this part shall provide to each individual parent—

(i) information on the level of achievement of the parent's child in each of the State academic assessments as required under this part; and

(ii) timely notice that the parent's child has been assigned, or has been taught for four or more consecutive weeks by, a teacher who is not highly qualified.

(C) Format

The notice and information provided to parents under this paragraph shall be in an understandable and uniform format and, to the extent practicable, provided in a language that the parents can understand.

(i) Privacy

Information collected under this section shall be collected and disseminated in a manner that protects the privacy of individuals.

(j) Technical assistance

The Secretary shall provide a State educational agency, at the State educational agency's request, technical assistance in meeting the requirements of this section, including the provision of advice by experts in the development of high- quality academic assessments, the setting of State standards, the development of measures of adequate yearly progress that are valid and reliable, and other relevant areas.

(k) Voluntary partnerships

A State may enter into a voluntary partnership with another State to develop and implement the academic assessments and standards required under this section.

(l) Construction

Nothing in this part shall be construed to prescribe the use of the academic assessments described in this part for student promotion or graduation purposes.

(m) Special rule with respect to Bureau-funded schools

In determining the assessments to be used by each operated or funded by BIA school receiving funds under this part, the following shall apply:

(1) Each such school that is accredited by the State in which it is operating shall use the assessments the State has developed and implemented to meet

the requirements of this section, or such other appropriate assessment as approved by the Secretary of the Interior.

(2) Each such school that is accredited by a regional accrediting organization shall adopt an appropriate assessment, in consultation with and with the approval of, the Secretary of the Interior and consistent with assessments adopted by other schools in the same State or region, that meets the requirements of this section.

(3) Each such school that is accredited by a tribal accrediting agency or tribal division of education shall use an assessment developed by such agency or division, except that the Secretary of the Interior shall ensure that such assessment meets the requirements of this section.

* * *

20 U.S.C. § 6812

§ 6812. Purposes

The purposes of this part are—

(1) to help ensure that children who are limited English proficient, including immigrant children and youth, attain English proficiency, develop high levels of academic attainment in English, and meet the same challenging State academic content and student academic achievement standards as all children are expected to meet;

(2) to assist all limited English proficient children, including immigrant children and youth, to achieve

at high levels in the core academic subjects so that those children can meet the same challenging State academic content and student academic achievement standards as all children are expected to meet, consistent with section 6311(b)(1) of this title;

(3) to develop high-quality language instruction educational programs designed to assist State educational agencies, local educational agencies, and schools in teaching limited English proficient children and serving immigrant children and youth;

(4) to assist State educational agencies and local educational agencies to develop and enhance their capacity to provide high-quality instructional programs designed to prepare limited English proficient children, including immigrant children and youth, to enter all-English instruction settings;

(5) to assist State educational agencies, local educational agencies, and schools to build their capacity to establish, implement, and sustain language instruction educational programs and programs of English language development for limited English proficient children;

(6) to promote parental and community participation in language instruction educational programs for the parents and communities of limited English proficient children;

(7) to streamline language instruction educational programs into a program carried out through formula grants to State educational agencies and local educational agencies to help limited English proficient children, including immigrant children

and youth, develop proficiency in English, while meeting challenging State academic content and student academic achievement standards;

(8) to hold State educational agencies, local educational agencies, and schools accountable for increases in English proficiency and core academic content knowledge of limited English proficient children by requiring—

(A) demonstrated improvements in the English proficiency of limited English proficient children each fiscal year; and

(B) adequate yearly progress for limited English proficient children, including immigrant children and youth, as described in section 6311(b)(2)(B) of this title; and

(9) to provide State educational agencies and local educational agencies with the flexibility to implement language instruction educational programs, based on scientifically based research on teaching limited English proficient children, that the agencies believe to be the most effective for teaching English.

* * *

20 U.S.C. § 6842

§ 6842. Achievement objectives and accountability

(a) Achievement objectives

(1) In general

Each State educational agency or specially qualified agency receiving a grant under subpart 1 of this part shall develop annual measurable achievement objectives for limited English proficient children served under this part that relate to such children's development and attainment of English proficiency while meeting challenging State academic content and student academic achievement standards as required by section 6311(b)(1) of this title.

(2) Development of objectives

Such annual measurable achievement objectives shall be developed in a manner that—

(A) reflects the amount of time an individual child has been enrolled in a language instruction educational pro-gram; and

(B) uses consistent methods and measurements to reflect the increases described in subparagraphs (A)(i), (A)(ii), and (B) of paragraph (3).

(3) Contents

Such annual measurable achievement objectives—

(A) shall include—

(i) at a minimum, annual increases in the number or percentage of children making progress in learning English;

(ii) at a minimum, annual increases in the number or percentage of children attaining English proficiency by the end of each school year, as determined by a valid and reliable assessment of English proficiency consistent with section 6311(b)(7) of this title; and

(iii) making adequate yearly progress for limited English proficient children as described in section 6311(b)(2)(B) of this title; and

(B) at the discretion of the agency, may include the number or percentage of children not receiving waivers for reading or language arts assessments under section 6311(b)(3)(C) of this title, but this achievement objective shall not be applied to an eligible entity that, in a given school year—

(i) has experienced a large increase in limited English proficient children or immigrant children and youth;

(ii) enrolls a statistically significant number of immigrant children and youth from countries where such children and youth had little or no access to formal education; or

(iii) has a statistically significant number of immigrant children and youth who have fled from war or natural disaster.

(b) Accountability

(1) For States

Each State educational agency receiving a grant under subpart 1 of this part shall hold eligible entities receiving a subgrant under such subpart accountable for meeting the annual measurable

achievement objectives under subsection (a) of this section, including making adequate yearly progress for limited English proficient children.

(2) Improvement plan

If a State educational agency determines, based on the annual measurable achievement objectives described in subsection (a) of this section, that an eligible entity has failed to make progress toward meeting such objectives for 2 consecutive years, the agency shall require the entity to develop an improvement plan that will ensure that the entity meets such objectives. The improvement plan shall specifically address the factors that prevented the entity from achieving such objectives.

(3) Technical assistance

During the development of the improvement plan described in paragraph (2), and throughout its implementation, the State educational agency shall—

(A) provide technical assistance to the eligible entity;

(B) provide technical assistance, if applicable, to schools served by such entity under subpart 1 of this part that need assistance to enable the schools to meet the annual measurable achievement objectives described in sub-section (a) of this section;

(C) develop, in consultation with the entity, professional development strategies and activities, based on scientifically based research, that the agency will use to meet such objectives;

(D) require such entity to utilize such strategies and activities; and

(E) develop, in consultation with the entity, a plan to incorporate strategies and methodologies, based on scientifically based research, to improve the specific program or method of instruction provided to limited English proficient children.

(4) Accountability

If a State educational agency determines that an eligible entity has failed to meet the annual measurable achievement objectives described in subsection (a) of this section for 4 consecutive years, the agency shall—

(A) require such entity to modify the entity's curriculum, program, and method of instruction; or

(B)(i) make a determination whether the entity shall continue to receive funds related to the entity's failure to meet such objectives; and

(ii) require such entity to replace educational personnel relevant to the entity's failure to meet such objectives.

(c) Special rule for specially qualified agencies

The Secretary shall hold specially qualified agencies receiving a grant under this subpart accountable for meeting the annual measurable achievement objectives described in subsection (a) of this section in the same manner as State educational agencies hold eligible entities accountable under subsection (b) of this section.

PETITIONER'S BRIEF

122 (7) (8)

Nos. 08-289 and 08-294 (Consolidated)

Supreme Court, U.S.
FILED
FEB 19 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF ARIZONA,

Petitioner,

v.

MIRIAM FLORES, ET AL.,

Respondents.

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES, et al.,

Petitioners,

v.

MIRIAM FLORES, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE PETITIONER SUPERINTENDENT

ERIC J. BISTROW,
Counsel of Record
DARYL MANHART
MICHAEL S. DULBERG
MELISSA G. IYER
BURCH & CRACCHIOLO, P.A.
702 E. Osborn, Suite 200
Phoenix, Arizona 85014
phone: 602-274-7611
fax: 602-234-0341

Attorneys for Petitioner Superintendent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TCFTA YCCSBK 754

QUESTIONS PRESENTED

1. By mandating that the State of Arizona provide for a minimum amount of earmarked funding specifically allocated for English Language Learner programs statewide to comply with the "appropriate action" requirement of §1703(f) of the Equal Education Opportunity Act, did the Ninth Circuit violate the doctrine prohibiting federal courts from usurping the discretionary power of state legislatures to determine how to appropriately manage and fund their public education systems?

2. Should the phrase "appropriate action" as used in §1703(f) of the Equal Education Opportunity Act be interpreted consistently with the No Child Left Behind Act of 2001, where both Acts have the same purpose with respect to English Language Learners and the NCLB provides specific standards for the implementation of adequate English Language Learner programs, but the EEOA does not?

PARTIES INVOLVED

Petitioner is Thomas C. Horne, Superintendent of Public Instruction of the State of Arizona.

Respondents Speaker of the Arizona House of Representatives and President of the Arizona Senate were Intervenor-Appellants below. These Respondents are also Petitioners in Case No. 08-294 which has been consolidated with this matter.

Respondents, who were Defendants-Appellants below, are the State of Arizona and the Arizona State Board of Education.

Respondents who were Plaintiffs-Appellees below are Miriam Flores, individually and as a parent of Miriam Flores, a minor child, and Rosa Rzeslawski, individually and as a parent of Mario Rzeslawski, minor child, on behalf of themselves and all others similarly situated.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES INVOLVED	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
I. Introduction	2
II. The History of this Dispute	5
III. The Original 2000 Order	8
IV. The Evidentiary Record	13
A. Arizona Adopted a New Theory of ELL Instruction After the Original 2000 Order	13
B. Arizona Complies with the Federal Accountability Requirements of ELL Students	16
C. The Fiscal Assumptions of the Original 2000 Order Have Been Refuted by Intervening Events	19
D. New Management at NUSD Energized Education at NUSD	23
E. NUSD Runs an Effective ELL Program	26
F. The Ninth Circuit Ruling	30

TABLE OF CONTENTS – Continued

Page

SUMMARY OF ARGUMENT 31

ARGUMENT 33

I. THE LOWER COURTS ERRED BY REQUIRING EARMARKED FUNDING FOR ENGLISH LANGUAGE LEARNERS TO ACHIEVE EEOA COMPLIANCE AND THEREFORE IMPROPERLY DENIED RULE 60(b)(5) RELIEF 33

A. In the Context of Institutional Reform, Rule 60(b)(5) Relief is Appropriate When the Statutory Violation Originally Identified Has Been Cured 34

B. A Violation of the EEOA Is Cured By Performance, Not Funding 37

C. The State Has the Discretion to Choose the Method of Performance Appropriate to Achieve Compliance with the EEOA 39

D. In this Case, the State of Arizona Achieved Compliance with the EEOA By Performance 42

1. Performance By Effective ELL Programs 43

2. Performance By Increased Funding ... 47

TABLE OF CONTENTS – Continued

Page

II. NCLB'S SPECIFIC STANDARDS FOR THE IMPLEMENTATION OF ADEQUATE ELL PROGRAMS SHOULD BE USED TO DEFINE THE MEANING OF "APPROPRIATE ACTION" UNDER THE EEOA 51

A. The Meaning of a General Statute May Be Defined by Subsequent, More Specific Legislation Addressing the Same Subject Matter 51

B. Although the General Phrase "Appropriate Action" Used in the EEOA Is Ambiguous, the NCLB Contains More Specific Guidelines for the Implementation of Adequate ELL Programs to Satisfy the Statutes' Identical Goals 52

1. Goals of the EEOA and NCLB are Identical 55

2. The Meaning of "Appropriate Action" Under the EEOA Should Be Determined By NCLB's Specific Standards 57

C. Because Arizona Has Satisfied the Specific Standards For Its ELL Programming Set Forth Under NCLB, It Has Taken "Appropriate Action" Under the EEOA 58

D. Interpreting the EEOA and NCLB Consistently Will Not Result in A "Repeal By Implication" 59

III. Conclusion 61

TABLE OF AUTHORITIES

Page

CASES

Agostini v. Felton, 521 U.S. 203 (1997).....34, 35, 37

Ambach v. Norwick, 441 U.S. 68 (1979) 39

Asgrow Seed Co. v. Winterboer, 513 U.S. 179 (1995).....37

Ass'n for Retarded Citizens v. Schafer, 872 F. Supp. 689 (D.N.D. 1995).....35

Bd. of Educ. of Okla. City Pub. Schs. v. Dowell, 498 U.S. 237 (1991).....33, 34, 41

Busic v. United States, 446 U.S. 398 (1980) 51

Castañeda v. Pickard, 648 F.2d 989 (5th Cir. 1981).....38, 51, 53, 54, 57

Dandridge v. Williams, 397 U.S. 471 (1970) 39

Evans v. Buchanan, 555 F.2d 373 (3d Cir. 1977).....49

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).....52, 56

Firstar Bank, N.A. v. Faul, 253 F.3d 982 (7th Cir. 2001).....52

Flores v. Arizona, 172 F. Supp. 2d 1225 (D. Ariz. 2000).....1, 2, 15, 22, 31

Flores v. Arizona, 480 F. Supp. 2d 1157 (D. Ariz. 2007).....1

Flores v. Arizona, 516 F.3d 1140 (9th Cir. 2008).....1, 3, 8, 56

Freeman v. Pitts, 503 U.S. 467 (1992).....41

TABLE OF AUTHORITIES – Continued

Page

Gomez v. Illinois State Bd. of Educ., 811 F.2d 1030 (7th Cir. 1987) 38

Great Northern R. Co. v. United States, 315 U.S. 262 (1942) 51

Guadalupe Organization, Inc. v. Tempe Elem. School Dist. No. 3, 587 F.2d 1022 (9th Cir. 1978) 51, 53

Imprisoned Citizens Union v. Shapp, 461 F. Supp. 522 (E.D. Pa. 1978) 35

In re Detroit Auto Dealers Ass'n, 84 F.3d 787 (6th Cir. 1996) 35

Keyes v. School Dist. No. 1, 576 F. Supp. 1503 (N.D. Colo. 1983) 44, 53

Milliken v. Bradley, 418 U.S. 717 (1974) 39

Milliken v. Bradley, 433 U.S. 267 (1977) 36

Missouri v. Jenkins, 515 U.S. 70 (1995) 35, 36, 37, 41, 49

Preiser v. Rodriguez, 411 U.S. 475 (1973) 51

Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992) 34

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) 40

Spallone v. United States, 493 U.S. 265 (1990) 36

Stanley v. Darlington County Sch. Dist., 84 F.3d 707 (4th Cir. 1996) 40

TABLE OF AUTHORITIES – Continued

Page

State v. Oregon Short Line R. Co., 617 F. Supp. 207 (D. Idaho 1985) 51

Teresa P. by T.P. v. Berkeley Unified School Dist., 724 F. Supp. 698 (N.D. Cal. 1989) 38

United States v. Estate of Romani, 523 U.S. 517 (1998) 52, 57

United States v. Fausto, 484 U.S. 439 (1988) ... 52, 60, 61

United States v. Locke, 471 U.S. 84 (1985) 37

Wyatt v. Rogers, 985 F. Supp. 1356 (M.D. Ala. 1997) 40

Youngberg v. Romeo, 457 U.S. 307 (1982) 40

FEDERAL STATUTES

147 Cong. Rec. 13327 (Dec. 17, 2001) 55

147 Cong. Rec. 13328 (Dec. 17, 2001) 28

147 Cong. Rec. 13331 (Dec. 17, 2001) 41

20 U.S.C. §1703(f) ..... *passim*

20 U.S.C. §1712 ..... 41, 42, 55

20 U.S.C. §6311 17

20 U.S.C. §6801 ..... 2, 16, 54

20 U.S.C. §6812(1) 55

20 U.S.C. §6823 ..... 54, 55

20 U.S.C. §6826 ..... 54, 55

20 U.S.C. §6842 ..... 17, 18, 44

TABLE OF AUTHORITIES – Continued

Page

20 U.S.C. §7844(a)(3)(C) 56

28 U.S.C. §1254(1) 1

Ariz. Rev. Stat. §15-741 18

Ariz. Rev. Stat. §15-751 13

Ariz. Rev. Stat. §15-756.01 8

Ariz. Rev. Stat. §15-901.01 20

FEDERAL RULES

Federal Rule of Civil Procedure 60(b)(5) ..... *passim*

OTHER AUTHORITIES

Webster's New World Dictionary (3d college ed. 1991) 38

BRIEF FOR THE PETITIONER SUPERINTENDENT

OPINIONS BELOW

The opinion of the Court of Appeals is published at 516 F.3d 1140 (9th Cir. 2008). App. 1-92.[1] The order of the District Court is published at 480 F. Supp. 2d 1157 (D. Ariz. 2007). App. 93-115. An earlier Memorandum Decision of the Ninth Circuit was filed August 23, 2006. App. 116-20. The original judgment from which the Petitioner sought Rule 60(b)(5) relief is published at 172 F. Supp. 2d 1225 (D. Ariz. 2000). App. 154-91.

JURISDICTION

The Petition for Writ of Certiorari was filed on August 29, 2008, and was granted on January 9, 2009. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

[1] "App." refers to Petitioner Superintendent's Appendix to the Petition for Certiorari followed by the page. "I. App." refers to the appendix of the Petitioners Speaker of the Arizona House and President of the Arizona Senate. "CR" refers to the District Court's Docket Sheet. TE refers to trial exhibits followed by the exhibit number. "Tr.Day___, p.___" refers to the day of the transcript of the evidentiary hearing followed by the page. The days of the hearing transcript are as follows: Day 1 – January 9, 2007; Day 2 – January 10, 2007; Day 3 – January 11, 2007; Day 4 – January 12, 2007; Day 5 – January 13, 2007; Day 6 – January 18, 2007; Day 7 – January 24, 2007; Day 8 – January 25, 2007.

STATUTORY PROVISIONS INVOLVED

The Equal Education Opportunity Act of 1974 ("EEOA"), 20 U.S.C. §1703(f) states (emphasis added):

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . .
>
> (f) the failure by an educational agency to take ***appropriate action*** to overcome language barriers that impede equal participation by its students in its instructional programs.

The provisions of the No Child Left Behind Act ("NCLB"), 20 U.S.C. §6801, *et seq.*, are extremely lengthy and are set out in the Appendix to the Superintendent's Petition for a Writ of Certiorari. App. 196-261.

STATEMENT OF THE CASE

I. Introduction

The District Court (Hon. Alfredo Marquez) in *Flores v. Arizona*, 172 F. Supp. 2d 1225 (D. Ariz. 2000) ("original 2000 order") declared that Arizona's funding and oversight of the Nogales Unified School District's ("NUSD") English language learner ("ELL") program violated EEOA §1703(f) because NUSD lacked sufficient resources to mount an effective ELL program. The program then was Bilingual Education/English as a Second Language ("ESL").

Substantial legal and factual changes occurred in the ensuing seven years, including a change in the ELL program to Structured English Immersion, funding increases, compliance with federal standards under NCLB, better management, and increased oversight. Those changes enabled NUSD to conduct programs reasonably calculated to permit ELL students to learn English and advance academically.

Given these vast improvements, the Superintendent of Public Instruction for the State of Arizona, Thomas C. Horne ("Superintendent"), sought Rule 60(b)(5) relief to end federal court oversight on the ground that compliance with the objectives of §1703(f) had been achieved. Notwithstanding the changes in program and funding, the District Court (then Hon. Raner Collins) made no comment on Arizona's compliance with NCLB, but denied relief in 2007 on the basis that the funding mechanisms of the new statute contained problems that were the same as found in 2006, referring back to an earlier order.[2] 480 F. Supp. 2d 1157. App. 99. Affirming, the Ninth Circuit (different panel than 2006 remand) held that Rule 60(b)(5) relief could only be achieved if Arizona funded ELL programs from a designated source of funds and concluded that "incremental funding is what matters for EEOA purposes." *Flores*

---

[2] This amounted to a failure to follow the directive from a 2006 Ninth Circuit remand to determine "whether changed circumstances required modification of the original court order" issued in January 2000. App. 110-20.

v. Arizona, 516 F.3d 1140, 1171 (9th Cir. 2008). App. 1-92.

To the contrary, the EEOA is silent about sources of funding. It is a performance statute, not a funding statute. It requires the State to take "appropriate action to overcome language barriers." Accordingly, a proper interpretation of the EEOA requires federal courts to relinquish remedial jurisdiction when the purpose of the EEOA, *i.e.* effective ELL programs, has been achieved. State and local authorities should be permitted to manage their own affairs and if they can show that a federal statutory violation has been cured, albeit not in the manner contemplated by the federal court, they should be allowed to do so.

In this case, "appropriate action" has been taken by improving ELL programming, hiring qualified teachers, and reducing class sizes. At the same time, Arizona's education funding has also substantially increased. In addition to these factual changes, the enactment of NCLB also brought about significant changes to the manner in which ELL students were being taught nationwide. As a result of these measures – all taken since the original 2000 order was entered – ELL students are now provided equal education opportunities by the State of Arizona. Accordingly, Rule 60(b)(5) relief was improperly denied.

II. The History of this Dispute

The Plaintiffs brought the case in the United States District Court for the District of Arizona on behalf of all Hispanic, black, and Native American children enrolled in NUSD. The Defendants are the Superintendent, the State Board of Education, and the State of Arizona. The Second Amended Complaint alleged, among other things, that the Defendants violated Plaintiffs' rights under the EEOA in their "oversight, administration and funding of federally mandated instruction for Limited English Proficient ("LEP" now "ELL") students enrolled in the Arizona public school system." CR83.

On August 28, 1997, the District Court certified the case as a class action. The class was defined as all minority at risk and ELL students "now or hereafter enrolled in the Nogales Unified School District as well as their parents and guardians." CR105. This class was never expanded.

The District Court entered the original 2000 order against the Defendants holding that they violated §1703(f) of the EEOA by failing to adequately fund and oversee NUSD's ELL program. App. 154. A series of post-judgment remedial proceedings ultimately led to contempt orders under which graduated fines, reaching two million dollars per day, were levied against the State. App. 133-53. Legislation (Arizona House Bill 2064) was enacted in the face of these fines. I. App. 268a. The Speaker of the Arizona House of Representatives and President of the Arizona

Senate ("Intervenor-Defendants") were permitted to intervene. CR390. Rule 60(b)(5) motions were filed seeking relief from the original 2000 order because of material changes in ELL funding, programs, and the new legislation. CR422, 433. Without examining whether changed circumstances rendered the original 2000 order satisfied, the District Court held that certain funding mechanisms of HB2064 violated federal law and denied the Rule 60(b)(5) motions. App. 121-32.

Timely appeals were taken from various orders to the Ninth Circuit Court of Appeals (the "First Appeal"). CR 445, 465. The Ninth Circuit issued a Memorandum Decision on August 23, 2006, (App. 116), vacating the prior sanction orders of the District Court and remanding the matter for an evidentiary hearing to determine whether the Intervenor-Defendants and the Superintendent were entitled to relief under Rule 60(b)(5). Significantly, the remand order in the First Appeal stated:

> In the interim, the landscape of educational funding has changed significantly. We have held that, because "the scope of federal relief against an agency of state government must always be narrowly tailored to enforce federal constitutional and statutory law only . . . federal courts must be sensitive to the need for modification [of permanent injunctive relief] when circumstances change." ***In light of the changes in education programs and funding since the original 2000 order, the district court should have held***

> ***an evidentiary hearing and made findings of fact regarding whether changed circumstances required modification of the original court order*** or otherwise had a bearing on the appropriate remedy.

App. 119-20 (emphasis added).

Eight days of evidentiary hearings were held in January 2007. On March 22, 2007, the District Court entered an order again denying the requested relief under Rule 60(b)(5). App. 93-115.

Instead of focusing on whether new programs, increases in funding, better management, and changes in the law brought NUSD into compliance with §1703(f) of the EEOA, the District Court rested its decision upon analysis of the previously enacted HB2064, although there was no need to address this remedy if conditions sufficiently changed to eliminate liability. App. 99.

The Superintendent and Intervenor-Defendants timely filed separate appeals (the "Second Appeal"). CR639, 640. At the heart of the Second Appeal was the contention that the District Court erred because of its narrow focus on HB2064 and by failing to recognize that the world of education in NUSD, as described in the original 2000 order, no longer existed. This was because new programs, new legal parameters, more funding, and solid management, cured the deleterious conditions described in that order. Evidence presented at the evidentiary hearing unequivocally demonstrated that, by 2007, NUSD

conducted effective ELL programs and complied with §1703(f).

The Ninth Circuit affirmed the District Court. App. 1. It held that Rule 60(b)(5) relief could not be granted until Arizona statutorily appropriated a specific funding source covering the incremental costs of ELL education.[3] App. 40-45, 46-48, 62-64, 68-72. The rationale for this decision was that the legal parameters of the original 2000 order required earmarked funding and that if the problem was cured using district and other funds, that was insufficient. App. 69-70. The Ninth Circuit refused to consider myriad legal and factual changes which showed that not only was NUSD able to conduct effective ELL programs, but also that it complied with the "appropriate action" requirement of §1703(f). According to the Ninth Circuit's logic, "incremental ELL funding is what matters for EEOA purposes," regardless of the quality of the program offered to ELL students. *Flores*, 516 F.3d at 1171. App. 70.

III. The Original 2000 Order

The Ninth Circuit's misplaced focus on "incremental ELL funding" resulted from its misinterpretation of

---

[3] Incremental costs are generally those ELL costs that are in addition to those costs for conducting programs for English proficient students under Ariz. Rev. Stat. §15-756.01, *et seq.*

the factual and legal findings set forth in the original 2000 order. A careful examination of the original 2000 order reveals the error of the Ninth Circuit's analysis. The 2000 order does not deal exclusively with funding. Rather, it examines how a lack of funding influenced the failure of the ELL programming at NUSD. Accordingly, "what matters for EEOA purposes," is adequate programming *not* funding from a particular source.

At the very outset of the original 2000 order, the District Court stated that the purpose of the lawsuit was to address the alleged failure to provide ELL students at NUSD with a program reasonably calculated to teach them English, all in violation of §1703(f). App. 154. The Plaintiffs asserted that this failure resulted from inadequate funding *and oversight* by the Defendants. App. 157. Thus, the district court's original 2000 order had two primary focuses – (1) evaluating Arizona's funding scheme, and (2) evaluating NUSD's ELL program deficiencies.

In its findings of fact, the District Court addressed Arizona's funding scheme first. Under that scheme, every school district is allotted equalization funds from which it can budget for maintenance and operations. App. 158-59. Those funds are formulaic and, in part, are determined by the number of students enrolled at the school district multiplied by Group "B" weights for certain factors including students with special needs. App. 160. Equalized funding for each district is then determined by multiplying base level funding set by the state by the number of

students for that district. *Id.* The Group "B" weight for ELL students in 2000 was .060 which amounted to approximately $150.00 per pupil. App. 162. To the extent that a district's local tax base was insufficient to raise sufficient monies to meet its equalization entitlement, the State made up the difference. App. 163. A school district, such as NUSD, had the right to increase its equalization allotment by 10% through a voter approved "override" to increase local taxes. App. 164. NUSD, however, had no override and seemed unlikely to pass one because of its low tax base. App. 165-66. The District Court also found that the legislature stopped increasing base level funding at the actual inflation rate. App. 159-60. Because of these financial restrictions, including the inability to pass an override, NUSD was financially stretched so that it could not increase monies for ELL programs without impacting non-ELL programs. App. 166.

With this financial backdrop, the District Court's factual findings then focused on the inadequacies of the ELL program at NUSD and its inability to implement the bilingual and ESL theories of instruction that it had adopted.[4] App. 167-69. Bilingual education strategies failed at NUSD's six elementary schools. App. 170-71. NUSD could not hire enough trained teachers with a bilingual or ESL teaching

---

[4] Bilingual education teaches students so that they are literate in both English and Spanish. ESL education, in theory, is to teach ELL students sufficient English so that they can be mainstreamed into the regular classroom. App. 169.

endorsement.[5] *Id.* As a result, ELL students languished in overcrowded mainstream classrooms. App. 170. Though the two middle schools adopted an ESL theory of instruction, the same problems beset their program. The middle schools employed so few endorsed teachers that only "newcomers" received instruction in English language development ("ELD") while the majority of ELL students received none. App. 171-72. The ESL model used at the high school level also could not be properly implemented. App. 173-75. The vast majority of ELL students were mainstreamed and received no ELD during the school day. App. 174. NUSD was required to hire non-English speaking teachers to teach ELL students in content areas because it could not afford to hire "endorsed" teachers. App. 175. Other problems included overcrowded classrooms, not enough qualified teachers and teaching aides, insufficient teaching materials, and inadequate tutoring. App. 187. The District Court found that the State provided no assistance to help NUSD rectify these program deficiencies. App. 178.

The District Court then reached a series of legal conclusions. It stated that Group "B" funding of $150.00 for each ELL student was "arbitrary" and not related to actual funding needed for ELL programming. App. 188. It concluded that Group "B" weight

---

[5] To receive a bilingual endorsement, a teacher must pass a university test showing academic proficiency in Spanish. To receive an ESL endorsement, a teacher should know a second language. App. 168.

funding in combination with other funds provided by Arizona's funding scheme led to a series of program deficiencies. App. 187. It also determined that Arizona provided no assistance to offset funding deficiencies. *Id.* From these conclusions, the District Court held that the Defendants violated the "appropriate action" requirement of §1703(f) because they failed to provide sufficient resources and oversight so as to permit NUSD to implement its bilingual and ESL strategies. App. 188.

One critical feature of the original 2000 order was that funding was never dealt with in isolation from ELL programs. Out of the District Court's sixty-four findings of fact, nearly thirty directly deal with programmatic issues at Nogales. Many of these findings homed in on the pervasive deficiencies of the ELL program and the lack of ELD instruction. The District Court ultimately ruled that the State's funding was inadequate because it failed to provide sufficient "practices, resources, and personnel to remedy language barriers in NUSD." App. 188. What mattered to the District Court was that funding was connected to poor programming and did not allow NUSD's ELL students to overcome language barriers.

Further, the District Court did not measure the adequacy of funding by examining the ELL Group "B" weight alone and ignoring all other funding sources which impacted ELL students. The District Court examined all of the revenue sources available to NUSD. For example, the District Court noted that base level funding failed to keep pace with the rate of

inflation. App. 186. It found that NUSD lacked an override and that the State failed to provide other monies or benefits to make up for lack of funding. App. 187-88. The District Court also assumed that federal grant money would end and that no "state funds" would replace expiring "federal grants." Together these findings caused the District Court to conclude in 2000 that the State's Group "B" weight appropriation "in combination with its property based financing scheme" was inadequate. App. 187.

IV. The Evidentiary Record

A. Arizona Adopted a New Theory of ELL Instruction After the Original 2000 Order.

The theories of bilingual and ESL instruction pursued at NUSD were swept away with the passage of Arizona Proposition 203 by voters in November 2000.[6] Proposition 203 required ELL students to be taught through structured English immersion ("SEI") strategies so that all ELL students are placed in English language classrooms and taught in English. All of NUSD's schools followed this method of instruction by June 2005. Tr.Day4, p.10. This meant that the dual language approach inherent in bilingual and ESL strategies and which formed a critical part of the analysis in the original 2000 order no longer applied.

---

[6] Proposition 203 is codified at Ariz. Rev. Stat. §15-751 *et seq.*

To ensure that there were qualified teachers to teach this newly adopted SEI methodology, the State Board of Education required educators to be trained. TE 206. A curricular framework for instruction was adopted by the State Board in 2005, and all educators initially were required to receive at least a provisional SEI endorsement, and be fully endorsed within three years thereafter. Tr.Day1, p.57; TE 206. The Arizona Department of Education ("ADE") approved curriculum frameworks and developed a list of providers to perform training. Tr.Day1, p.58. In addition, Arizona House Bill 2010 provided $4.5 million annually for three years so that teachers could obtain this training. TE 208, p.18; Tr.Day1, p.63.[7] ADE also formed partnerships with entities so that teachers could obtain such training at a nominal cost. *Id.*, p.64-65.

The State also created English language proficiency standards that were tied to Arizona's language arts academic standards. *Id.*, p.36. Arizona was required to adopt these standards under NCLB. *Id.*, p.46. These standards were approved by the State Board in 2004 and were provided to every school district in the State. *Id.*, p.40. Those standards were crucial in providing guidance to teachers on what to teach and developing an appropriate and consistent curriculum for ELL students. *Id.*, pp.41-44.

---

[7] These are non-reverting funds and $8,000,000.00 was left in the teacher training fund at the time of the 2007 evidentiary hearing. TE 225.

By 2007, ADE had become fully engaged in the delivery of ELL services. The State provided uniform procedures and tests for the identification and placement of ELL students. TE 203-204. It conducted outreach programs to ELL educators to assist in professional development. Tr.Day1, pp.66-68. It doubled the number of schools that it was required to monitor under the *Flores* Consent Decree.[8] *Id.*, p.73. Further, a major expansion of staff permitted technical assistance to be provided to school districts so that districts could adopt successful strategies for teaching ELL students. *Id.*, pp.70-76.

The passage of Proposition 203 presaged a new era of ELL education in Arizona. The State transformed the SEI theory of instruction into a success story by providing the kind of assistance that the District Court found was lacking in the original 2000 order with respect to bilingual and ESL education. The evidentiary hearing showed that the State was at the very center of ensuring that teachers were properly trained, endorsed, and possessed English proficiency standards to guide their teaching.[9]

---

[8] The Consent Decree (CR206), referred to in the Ninth Circuit's opinion, required ADE to monitor school districts and review various aspects of ELL programming.

[9] HB2064 (I. App. 268a, 282a-83a) enacted in March 2006 further advanced ELL education. It required four hours of ELD instruction for beginning ELL students and established a task force to create ELL instruction models that school districts must follow. Those models deal with class ratios, quality of teachers, training, and time spent on ELD for all ELL students. Tr.Day1,

(Continued on following page)

The effect of this new program at NUSD was dramatic. Tr.Day4, pp.9-10. At the time of the evidentiary hearing, SEI instruction (rather than bilingual or ESL instruction) was offered in small groups at the elementary schools. Small self-contained ELD classes were provided at both the middle schools and high school. Tr.Day6, pp.20-25. Unlike in 2000, when substantial numbers of ELL students received no ELD, a minimum of two hours of daily ELD instruction was offered to all of NUSD's ELL students. *Id.*, pp.53-54. The new SEI program, substantial state support for that program, and changes within NUSD remedied those deficiencies in its ELL program which were identified in the original 2000 order.

B. Arizona Complies with the Federal Accountability Requirements of ELL Students.

One year after the original 2000 order was entered, Congress passed NCLB. NCLB seeks to improve the academic achievement of language instruction for limited English proficient and immigrant students. 20 U.S.C. §6801, *et seq.*, App. 234. Essentially, NCLB requires states receiving Title I and Title III funds to develop challenging academic content and student achievement standards that will be used by the State and local school districts to carry

---

pp.153-56. These models went into effect for the 2008-2009 school year.

out the goals of Title I. 20 U.S.C. §6311, *et seq.* App. 196. Further, NCLB requires that a statewide accountability system be established to ensure that local districts make adequate yearly progress ("AYP") and that the system includes sanctions to hold school districts accountable. TE 211; Tr.Day5, pp.151-53, App. 199-212. ELL students are a specifically defined subgroup of NCLB and they must meet annual measurable achievement objectives ("AMAO") for both academic AYP and progress toward attainment of English proficiency. 20 U.S.C. §6842. TE 211; Tr.Day1, pp.157-62; App. 255.

As a result of the passage of NCLB, ADE made major changes to assure that all Arizona ELL learners received "appropriate action" from their local school districts. ELL proficiency standards were promulgated to provide benchmarks for learning English, to allow school districts to design proper curriculum, and to permit ELL students to meet Arizona's language arts and academic standards. TE 202; Tr.Day1, pp.36-45. Arizona also adopted uniform assessment standards to identify and evaluate ELL students. That system classifies ELL students, determines when they are English proficient, and provides a tracking system to ensure that fluent English proficient students ("FEP") remain proficient. TE 203, 204; Tr.Day1, pp.46-54. Further, Arizona requires all teachers to undergo training and obtain SEI endorsements so they can effectively teach ELL students.

ADE not only provides wide ranging monitoring and technical assistance, it assists underperforming and failing schools through "solutions" teams comprised of the best educators in Arizona to identify problems, evaluate teaching methods, and provide suggestions for improvements. This program provides substantial assistance to ELL students who tend to live in lower socioeconomic neighborhoods. Tr.Day5, pp.156-60. In short, the enactment of NCLB and the changes in state programming for ELL education led to a systemic overhaul of Arizona's ELL programs. Many of these steps were approved by the federal government and none of them existed before 2000. Tr.Day1, pp.36, 43, 45, 47, 50, 55, 65, 70, 158.

NCLB also sets certain minimum targets so that specified percentages of a school district's or charter school's ELL students must (1) make progress towards proficiency, (2) achieve proficiency, and (3) achieve success academically (AYP) on Arizona's AIMS tests.[10] *Id.*, pp.158-59; 20 U.S.C. §6842. Those achievement benchmarks are documented annually through an AMAO score. Arizona's required percentages have been approved by the United States Department of Education and every school district and charter school is required to meet these pre-set percentages. *Id.*, pp.160, 187. Further, when a district

---

[10] "AIMS" or Arizona's Instrument to Measure Standards, are standardized academic tests in English for reading, writing, and mathematics given to all students, including ELL students, at various grade levels. Ariz. Rev. Stat. §15-741 *et seq.*

does not meet its annual measurable achievement objective (AMAO) requirements, the school district receives a warning the first year; the second year it receives technical assistance; and the third year Arizona will fund school improvement plans. Tr.Day1, p.161. None of these requirements was in place prior to the year 2000.

NUSD met all AMAO requirements for 2006. TE 218; Tr.Day1, p.188. NUSD vastly exceeded the NCLB proficiency requirements at every single grade level. Tr.Day1, pp.186-89; App. 312.

C. The Fiscal Assumptions of the Original 2000 Order Have Been Refuted by Intervening Events.

The District Court in the original 2000 order found that general education funding had been starved in the 1990s, NUSD could not pass an override, federal funds were drying up, and Group "B" weight money alone was not adequate to support an effective bilingual and ESL program at NUSD. Those findings are no longer valid.

First, equalization funding for maintenance and operations significantly increased. In 2000, such funding, statewide, totaled $3,431,059,000.00. This increased to $4,849,063,800.00 in the 2006 fiscal year. TE 225, p. 2. Translated on a per student basis, equalization funding increased from $4,084.00 in the 2000 fiscal year to $4,837.00 in the 2006 fiscal year. TE 225. Further, the 2007 budget provided new funding of

$80,000,000.00 to establish a new kindergarten Group "B" funding weight and another $100,000,000.00 for salary increases for non-administrative school personnel. TE 227.

More importantly, in November 2000, Arizona voters provided a significant boost in overall education funding and limited the ability of the legislature to lower equalization funding. They enacted Proposition 301, which increased sales tax revenue by .6% in order to provide added funding through a classroom site fund. This money was to be used for increasing base teacher salaries, for teacher performance pay, and for "menu items" such as tutoring and reducing class size. Tr.Day4, pp.116-24; TE 225. Proposition 301 had a major impact in increasing monies for education. For example, Proposition 301 added $235,346,200.00 to equalization funding in fiscal year 2002 and this increased to $494,572,500.00 in fiscal year 2006. TE 225. Further, one of the central concerns of the original 2000 order was addressed by the voters. Arizona Revised Statutes §15-901.01 (established by Proposition 301) required the legislature to increase base level funding by 2% each year through fiscal year 2006, and, thereafter, to be increased by 2% or the change in the GDP price adjuster, whichever is less. Base level funding could never be decreased below the 2001-2002 level. Tr.Day4, p.122.

Arizona HB2010 increased the Group "B" weight of ELL students from .060 to .115. The net result was to increase Group "B" weight monies from $140.00 per ELL student to $350.00 per ELL student. *Id.*,

p.136; TE 208. The legislature, through HB2010, provided compensatory instruction for ELL students who needed intervention through tutoring or individualized instruction. For such purposes, the legislature appropriated the sum of $3,080,000.00 for fiscal year 2002, the sum of $5,500,000.00 for fiscal year 2003, the sum of $5,500,000.00 for fiscal year 2004, and the sum of $5,500,000.00 for fiscal year 2005. School districts did not spend all of these monies and $900,000.00 remained in this fund as of the date of the evidentiary hearing. TE 225, Tr.Day4, pp.126-28. Finally, HB2010 provided $4.5 million through fiscal year 2005 so school districts could purchase ELL materials.[11] TE 225.

Arizona HB2064 appropriated $10,000,000.00 in fiscal year 2007 for ELL compensatory education. TE 210. It provided additional funding of $2,555,000.00 and $4,610,000.00 to cover school district costs for providing English language proficiency tests and ancillary materials and added twenty new positions so ADE could increase technical assistance to school districts for ELL programming. TE 225.

As a result of both State and local funding increases, NUSD revenues soared after 2000. For

---

[11] As noted earlier, House Bill 2010 also provided non-reverting funds for teacher training totaling $13,500,000.00. At the time of the hearing, $8,000,000.00 of these funds had not been used by school districts. Tr.Day5, p.91; TE 225.

example, NUSD passed an override right after the original *Flores* opinion issued and continued to pass overrides each year through the 2007 evidentiary hearing.[12] As a result, NUSD had available an additional $1,674,000.00 for operations that was not available in 2000. TE 225, p. 5. Indeed, monies from state, county, and local sources increased the NUSD maintenance and operation budget from $22,195,385.00 in FY2000 to $28,956,939.00 in FY2007, a 30% increase. This occurred even though the student population decreased from 5,989 in FY2000 to 5,865 in FY2007 and the ELL population decreased from 5,104 in FY2000 to 2,474 in FY2006. TE 225.[13]

Arizona made structural changes in general and specific ELL funding that enhanced NUSD's ability to fund all of its programs, including ELL programming.

---

[12] In the original 2000 order, the District Court inaccurately indicated that NUSD was unlikely to pass an override to supplement its maintenance and operations budget. App. 166.

[13] The original 2000 order also found that federal grant money for ELL students in the future would be drastically reduced. App. 179-81. This prognostication proved wrong. Additional federal dollars have poured into the State as a result of NCLB. At NUSD, Title I monies increased from $1,644,029.00 in 2000 to $3,074,587.00 in 2006, Title II monies increased from $216,000.00 in 2000 to $466,996.00 in 2006, and Title III monies, which did not exist in 2000, increased from $261,818.00 in 2003 to $322,900.00 in 2006. There were significant carryovers in each of those funds. TE 224, 225, 235.

NUSD joined in the effort to broadly increase funding when its voters taxed themselves and passed an override. In short, Arizona's citizens and locally elected politicians collectively addressed the funding concerns raised in the original 2000 order by providing more financial assistance generally and more ELL assistance specifically.

D. New Management at NUSD Energized Education at NUSD.

Kelt Cooper, NUSD's new superintendent from August 2000 to June 2005, found on his arrival that NUSD was dysfunctional. He testified that had additional money been provided in 2000 without major changes in NUSD's educational structures, those infusions would have made no difference in outcomes. Tr.Day4, p.71. In its March 22, 2007 order, the District Court credited Mr. Cooper with achieving improvements at NUSD. App. 97. The uncontroverted evidence was that most of the problems at NUSD had little to do with money, but resulted from lack of leadership and lack of good management. By the time Mr. Cooper left, the problems set forth in the original 2000 order had essentially been solved and ELL students were learning English and advancing academically. Tr.Day4, pp.61-64, 66-67. Indeed, during his tenure as superintendent, no one ever advised him that ELL programs needed more money. *Id.*, p.65.

Class sizes were a serious problem when Cooper arrived. He found that these high class sizes largely resulted from NUSD's failure to enforce its own attendance policies. Tr.Day3, pp.201-13; Tr.Day4, p.4. NUSD was permitting students from Mexico to attend its schools.[14] It allowed a neighboring school district to send its students to NUSD even though NUSD lacked room for those students. Tr.Day3, pp.203-13. The school board addressed these problems by setting goals to achieve low student teacher ratios and allowing Cooper to vigorously enforce NUSD's attendance policy. *Id.*, pp.210-12; TE 212. Those goals were met in 2002. Tr.Day3, p.212. Indeed, the reduction in class size was accomplished without hiring any new teachers. Tr.Day4, p.94. After Cooper left, NUSD reduced class sizes even further. Tr.Day6, pp.24-25.

There was a lack of textbooks, not from insufficient funds, but from a decentralized purchasing policy with zero accountability. Cooper found that some textbooks were so old that they did not even align with the State's academic standards. Tr.Day3, pp.216-18; Tr.Day4, pp.15-23. After the original 2000 order, this dysfunctional purchasing policy ended, and

---

[14] Nogales is a border town with Mexico. In one instance, Cooper found that thirty students listed a single address in Nogales as their residence.

formal centralized book adoption processes were adopted so that NUSD had sufficient instructional materials. *Id.*, pp.18-23.

Lack of quality teachers was also a problem. Cooper described a practice under which NUSD not only hired student teachers with no degree, but also teachers from Mexico who were unable to speak English so that students could be "bicultural." *Id.* pp.7-8, 62, 95. These teachers were hired under the misnomer "Master Teachers." Those practices ended. *Id.* pp.7, 63. To attract better teachers, NUSD changed its policies to allow year-for-year credit for teaching experience. The resulting pay increases attracted more qualified teachers. *Id.* pp.5-7. Indeed, salaries dramatically increased and NUSD's average salary climbed from $31,055 in 2000 to $41,105 in 2006. TE 236.

The original 2000 order noted there was a lack of teacher aides. App. 187. Cooper found that the aides used at NUSD were ineffective, unqualified, and could not even speak English. A decision was made by NUSD to largely eliminate aides, thereby making funds available for other, more beneficial purposes such as the hiring of quality teachers. Tr.Day3, p.223; Tr.Day4, pp.11-14.

Cooper also found a lack of intellectual rigor and ended policies of social promotion and interdisciplinary courses that tolerated teaching in subjects such as mathematics for only one and one-half hours per week. Tr.Day4, pp.24-43. He addressed outdated

addenda for teachers and ended abuses relating to teacher release time. *Id.* pp.43-46, 48-50. Cooper instituted improvement plans at each school, zero based budgeting, expanded remediation efforts, and established clear achievement goals. *Id.* pp.26, 31-34, 54.

E. NUSD Runs an Effective ELL Program.

ADE sent a Task Force to NUSD in March 2006, after testing data showed that ELL students at four of NUSD's schools scored in the top ten in the State on Arizona's AIMS test. The purpose of the Task Force was to determine how NUSD was able to produce such excellent results. Tr.Day1, pp.163-65; TE 214. Irene Moreno, head of ADE's English Acquisition Unit, determined that NUSD conducted an effective ELL program because it employed four basic strategies. First, NUSD's schools provided small SEI classes that emphasized English language development. Second, intervention strategies were used so that ELL students who needed help were given special attention during the school day. Third, tutoring took place before, during, and after school. Finally, a software program was used to evaluate progress of ELL students so teachers could obtain immediate feedback and focus on an individual student's needs. Tr.Day1, pp.166-69; TE 214.

The Task Force also reviewed deficiencies listed in the original 2000 order. Those deficiencies were ameliorated or cured.

The original 2000 order cited an inadequate number of classrooms in NUSD. App. 187. That condition was eliminated. TE 214, 225, p.7; Tr.Day1, p.174.

The original 2000 order determined that there was insufficient tutoring and insufficient language development during the day. App. 178, 187. The March 2005 ADE site visit demonstrated that not only was ELD being provided, but NUSD established intervention measures to benefit ELL students during the school day, offered summer school remediation programs, and, as noted, provided tutoring for its ELL students throughout the day. TE 214, Tr.Day1, pp.63-169.

The original 2000 order also raised concerns about student-teacher ratios. App. 187. ADE's Task Force actually counted the students at each school and confirmed that class size was no longer a problem. Tr.Day1, pp.171-72, 174; TE 214.

The original 2000 order stated that there were insufficient instructional materials for ELL students. App. 178, 187. With the exception of one middle school which only had classroom textbooks (an issue that was being resolved), NUSD had sufficient textbooks, and supplemental materials for its ELL population. Tr.Day1, pp.173, 177, 178, 182, 183; TE 214.

Though the original 2000 order complained about teacher aides, Cooper eliminated aides as a detriment to NUSD's overall program. App. 187. The Task Force found that this decision had no impact on the effectiveness of teachers. Tr.Day1, pp.170, 174.

The original 2000 order was concerned about teachers who were not trained and endorsed. App. 187. That issue was resolved when Arizona switched from bilingual/ESL strategies to SEI and the State undertook the responsibility for training and endorsing teachers in this new methodology.[15] When the Task Force visited NUSD, it found excellent teaching, particularly at the elementary school level. Tr.Day1, p.175.

Those material changes identified by the Task Force led to outstanding results at NUSD. By 2007, the number of identified ELL students had nearly been cut in half, due in large part to a substantial increase in ELL students becoming proficient in English more quickly and being graduated out of the ELL program and reclassified as mainstream students. TE 215. In a school district with nearly 50% of

---

[15] Indeed, in the legislative history of the subsequently enacted NCLB, Congressional leaders noted the general failure of the bilingual strategy (in effect in Arizona in 2000) and endorsed the use of SEI that was adopted in Arizona by Proposition 203.

> [W]e adjust and change a large number of programs which really were not working all that well. For example, bilingual education, the second largest account under title I under the ESEA. ***Yet we know what happened to bilingual education. It got off track.*** Instead of kids learning English, we ended up isolating kids, took them on a train track that took them to their language and left them there.

147 Cong. Rec. 13328 (Dec. 17, 2001) (statement of Senator Gregg) (emphasis added).

its population ELL and 75% of its students poverty stricken, an ADE study showed that at four NUSD schools some 70% to 80% of its ELL students who were classified in 2003 as ELL students passed all three AIMS tests in English in 2005. TE 216. These results placed these ELL students above the overall state average (including non-ELL students) of 66%. TE 217; Tr.Day5, p.134.

Every professional educator who testified about NUSD also concluded that at current levels of funding, NUSD (the only district at issue) provides an effective ELL program. Tr.Day1, pp.96-99, 113-14, 192; Tr.Day3, p.180; Tr.Day4, p.67; Tr.Day5, p.134. A nationally recognized expert, Dr. Rosalie Porter, testified about her investigation of the success of NUSD's ELL programs:

> I have a very high opinion of the Nogales Unified School District for the job it is doing for its ELL students . . . the high level of performance on AIMS tests, SAT-9 tests, the progress from year to year where improvement is shown, the high level of performance and high percentage of students tested is better than what I have seen in many places in California, Massachusetts and other places. This is just a fine performance.

Tr.Day1, p.113. Even the Plaintiffs' own witness, Dr. Guillermo Zamudio, NUSD's current superintendent, verified that NUSD conducts an effective ELL program and that it has sufficient classrooms, good student-teacher ratios, sufficient teaching materials,

experienced teachers, and now complies with federal requirements concerning ELL learners. Tr.Day6, pp.97, 98, 101, 107. In other words, Zamudio acknowledged that NUSD's ELL students were no longer being denied equal educational opportunities on par with their non-ELL peers.

F. The Ninth Circuit Ruling.

The Ninth Circuit acknowledged that the program deficiencies set forth in the original 2000 order had been "ameliorated," even cured. Nevertheless, the Ninth Circuit measured Rule 60(b)(5) relief, not in terms of effective programming or compliance with §1703(f), but solely in terms of whether Arizona's funding system, in particular Group "B" weights, covered the incremental costs of ELL education. According to the Ninth Circuit, "incremental ELL funding is what matters for EEOA purposes." App. 70. Under the Ninth Circuit's analysis, NUSD could have a first rate ELL program (a position taken by experts at the Rule 60(b)(5) hearing), yet there could be no relief from federal oversight if the money which funded the program came from non-earmarked sources.

The Ninth Circuit also determined that Arizona's compliance with the requirements of NCLB was irrelevant to whether Arizona had taken "appropriate action" under the EEOA. It found disparate purposes in the two statutes.

SUMMARY OF ARGUMENT

I. The touchstone for the decision in *Flores v. Arizona*, 172 F. Supp. 2d 1225 (D. Ariz. 2000) is that Arizona failed to fund and provide oversight of the dysfunctional bilingual and ESL education programs adopted in NUSD. As a result, the District Court determined that Arizona violated EEOA §1703(f). By 2007, however, conditions had materially changed. NUSD adopted a new theory of ELL instruction, SEI, as a result of a voter initiative. The State substantially increased both general funding and designated funding for ELL students. NUSD's citizens enacted overrides that provided unanticipated increases in funding. Common sense management at NUSD brought academic rigor, financial efficiencies, and better performance. Structural changes wrought by NCLB and State legislation placed the Arizona Department of Education at the very center in ensuring effective ELL programs. As a result, by 2007, NUSD's students engaged in a coherent program of instruction, were overcoming language barriers, and advancing academically. The purpose of §1703(f) had been fulfilled.

Nevertheless, the lower courts denied Rule 60(b)(5) relief on the mistaken ground that the original 2000 order required earmarked funding to cover the incremental costs of ELL education and that until this was done, there could be no compliance with the EEOA. This constituted error for several reasons.

First, in the context of institutional reform litigation, when the objectives of the original order have been fulfilled and a statutory violation cured, respect for principles of federalism requires the termination of federal oversight.

Second, the lower courts treated §1703(f) as a funding statute. In fact, it is a performance statute. When NUSD's ELL students, through SEI strategies, overcome language barriers and participate in instructional programs, compliance with §1703(f) is achieved. The lower court's ruling, by defining compliance in terms of a specific funding source, is disconnected to any violation of federal law.

Finally, state and local authorities are entitled to discretion in how to cure a federal violation. If they can do so with earmarked funding, earmarked funding in combination with other funding, more efficient management of resources, better oversight, or different programs, or any other combination they elect, they should be permitted to do so.

II. NCLB, enacted in 2001, sets forth specific requirements to ensure that school districts are held accountable to effectively teach ELL students English so they can achieve academically. Those specific requirements define the meaning of "appropriate action" under EEOA §1703(f). Arizona is in full compliance with NCLB. If Arizona is in compliance with specific federal requirements and standards for ensuring that ELL students attain English proficiency and advance academically, it is logically

inconsistent for the District Court to find that Arizona has not met the vague term "appropriate action" under §1703(f).

ARGUMENT

I. THE LOWER COURTS ERRED BY REQUIRING EARMARKED FUNDING FOR ENGLISH LANGUAGE LEARNERS TO ACHIEVE EEOA COMPLIANCE AND THEREFORE IMPROPERLY DENIED RULE 60(b)(5) RELIEF.

"[F]ederal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation." *Bd. of Educ. of Okla. City Pub. Schs. v. Dowell*, 498 U.S. 237, 247 (1991). In this case, the "conditions" leading to Arizona's violation of the EEOA in 2000, were inadequate ELL programming, inadequate texts, unqualified ELL teachers, and overcrowded ELL classrooms. By 2007, these "conditions," which were the basis for the statutory violation, were cured. Accordingly, Rule 60(b)(5) relief should have been granted. By focusing exclusively on earmarked funding and ignoring all other factual and legal changes in NUSD's ELL program, the Ninth Circuit erred. That error should now be corrected.

A. In the Context of Institutional Reform, Rule 60(b)(5) Relief is Appropriate When the Statutory Violation Originally Identified Has Been Cured.

Rule 60(b)(5) of the Federal Rules of Civil Procedure allows relief where "the judgment has been satisfied, released, or discharged . . . or it is no longer equitable that the judgment should have prospective application." Several of this Court's cases have rejected efforts to hang onto outdated and prospective orders when factual or legal circumstances have changed or the objectives of the original order have been fulfilled. For example, in *Bd. of Educ. of Okla. City Pub. Schs. v. Dowell*, 498 U.S. 237 (1991), this Court affirmed the proposition that when a constitutional violation has been rectified, judicial oversight should end. In *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), this Court reversed a district court's refusal to modify a consent decree to allow double bunking in jail cells. It admonished the lower court to be flexible in tailoring modifications to consent decrees in institutional reform litigation and to be mindful of financial constraints in devising a remedy. More recently, in *Agostini v. Felton*, 521 U.S. 203 (1997), this Court granted relief from an injunction which prevented the public school board from using public funds to provide services for private parochial schools. The Court ruled that the petitioner was entitled to relief under Rule 60(b)(5) because there had been significant changes in tne law regarding possible violations of the Establishment Clause:

> In *Rufo v. Inmates of Suffolk County Jail*, . . . we held that it is appropriate to grant a Rule 60(b)(5) motion when the party seeking relief from an injunction or consent decree can show a significant change either in fact or in law. . . . A court errs when it refuses to modify an injunction or consent decree in light of such changes.

521 U.S. at 215. These cases underscore the need for federal courts to exercise restraint, respect the allocation of powers within the federal system, and show deference for local and state governments, which bear the primary responsibility for assessing, solving, and dealing with problems of institutional reform.

In *In re Detroit Auto Dealers Ass'n*, 84 F.3d 787, 790 (6th Cir. 1996), the court stated that a party is entitled to have an injunction modified when the original decree would not have been issued "on the state of facts that now exists." When it is no longer equitable to enforce a prospective judgment, a court should focus on whether intervening changes have eliminated the need for the original judgment. *Ass'n for Retarded Citizens v. Schafer*, 872 F. Supp. 689 (D.N.D. 1995), *rev'd, in part, on other grounds* 83 F.3d 1008 (8th Cir. 1996); *Imprisoned Citizens Union v. Shapp*, 461 F. Supp. 522 (E.D. Pa. 1978).

In another context, in *Missouri v. Jenkins*, 515 U.S. 70 (1995), this Court rejected the district court's imposition of various inter-district remedies intended to attract "white students" from the suburbs to desegregate an urban school district as a judicial remedy

that lacked a sufficient nexus to the original intra-district constitutional violation. In so doing, this Court reaffirmed the three part framework from *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*), to guide district courts in devising desegregation remedies. That framework established that a judicial remedy must (1) be determined by the nature and scope of the violation of federal law, *i.e.*, the remedy must be directly related to the violation; (2) be remedial in practice; and (3) take into account the interests of state and local authorities in managing their own affairs. *Missouri v. Jenkins,* embraces the principle that a remedy must be sufficiently tailored to cure the violation.[16]

Justice Thomas, in his concurring opinion, raised deep concern about the "extravagant uses of judicial power" and elaborated on the third-prong of the *Milliken II* framework:

> Federal judges cannot make the fundamentally political decisions as to which priorities are to receive funds and staff, which educational goals are to be sought, and which values are to be taught. When federal judges undertake such local, day-to-day tasks, they detract from the independence and dignity of

---

[16] In *Spallone v. United States*, 493 U.S. 265, 272 (1990), this Court struck down a regimen of steep fines against members of a City Council because the District Court failed to "exercise the least possible power adequate to the end proposed."

> the federal courts and intrude into areas in which they have little expertise.
>
> . . . .
>
> But I believe that we must impose more precise standards and guidelines on the federal equitable power, not only to restore predictability to the law and reduce judicial discretion, but also to ensure that constitutional remedies are actually targeted toward those who have been injured.

515 U.S. at 133.

The Ninth Circuit decision is contrary to these principles of judicial restraint. It ordered an earmarked funding remedy without identifying a need or the specific problems that earmarked funding should address. It never explained why "appropriate action" cannot be satisfied through a combination of various measures including state and school district funding, districts being an instrumentality of the state. It failed to do this because compliance with the purpose of the statute had been achieved.

B. A Violation of the EEOA Is Cured By Performance, Not Funding.

"When terms used in a statute are undefined, we give them their ordinary meaning." *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995). *See also United States v. Locke*, 471 U.S. 84, 93 (1985) ("[A] literal reading of Congress' words is generally the only proper reading of those words.").

The EEOA §1703(f) (emphasis added) provides that a state shall not "deny equal educational opportunity to an individual on account of . . . national origin, by [failing] to take *appropriate action* to overcome language barriers that impede equal participation by its students in its instructional programs." "Appropriate" (used as an adjective) means "right for the purpose, suitable; fit; proper." *Webster's New World Dictionary*, 68 (3d college ed. 1991). "Action" is defined as "an act or thing done." *Id.* at 13. Thus, the "ordinary meaning" of the phrase "appropriate action" is any "act or thing done" which is "right for the purpose."[17]

Here, the purpose of the EEOA is to assist ELL students to overcome their language barriers and to participate academically with their non-ELL peers. This purpose may be served by any number of suitable "actions" taken including adopting a sound program theory, hiring qualified teachers, employing adequate texts, and reducing class sizes. Funding may assist in accomplishing these tasks, but it is not

---

[17] *See Gomez v. Illinois State Bd. of Educ.*, 811 F.2d 1030, 1040 (7th Cir. 1987) ("appropriate action . . . conferred substantial latitude" in choosing how to meet federal obligations); *Castañeda v. Pickard*, 648 F.2d 989, 1009 (5th Cir. 1981) ("appropriate action . . . indicates that Congress intended to leave . . . a substantial amount of latitude in choosing the programs . . . to meet" EEOA obligations); *Teresa P. by T.P. v. Berkeley Unified School Dist.*, 724 F. Supp. 698, 714 (N.D. Cal. 1989) ("appropriate action . . . intended to ensure that school districts make 'genuine and good faith efforts' ").

an end unto itself. Although it requires "appropriate action," §1703(f) makes no mention of "funding," nor does it suggest that funding is the exclusive means through which "appropriate action" may be taken.

C. The State Has the Discretion to Choose the Method of Performance Appropriate to Achieve Compliance with the EEOA.

If a State is not in compliance with the EEOA, changes in the source of funding may or may not be appropriate to achieving compliance. As long as the State achieves performance by some action, it is not for the court to dictate some other action. *See Dandridge v. Williams*, 397 U.S. 471, 487 (1970) ("[T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.").

"Today, education is perhaps the most important function of state and local government." *Ambach v. Norwick*, 441 U.S. 68, 76 (1979) (citation omitted). "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974). In particular, courts have largely resisted the invitation to become intimately involved

in a state's decision-making processes on the issue of education funding. "It would be an unfathomable intrusion into a state's affairs – and a violation of the most basic notions of federalism – for a federal court to determine the allocation of a state's financial resources. The legislative debate over such allocation is uniquely an exercise of state sovereignty." *Stanley v. Darlington County Sch. Dist.*, 84 F.3d 707, 716 (4th Cir. 1996).

Because the problems of financing and managing a public school system are highly complex, "there will be more than one constitutionally permissible method of solving them." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973). Consequently, "'the legislature's efforts to tackle the problems' should be entitled to respect." *Id.* The court should "make certain that professional judgment in fact was exercised," but "[i]t is not appropriate for the courts to specify which of several professionally acceptable choices should have been made.'" *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982). *See also Wyatt v. Rogers*, 985 F. Supp. 1356, 1386 (M.D. Ala. 1997) (choices made by state officials were given deference in determining whether state defendants complied with 1986 consent decree). Where a state's legislative efforts to comply with a remedial order are subject to scrutiny by a federal court, the standard of judicial review is highly deferential. *Id.* The EEOA requires the Court to "impose *only such remedies as are essential to correct* particular denials of equal educational

opportunity or equal protection of the laws." 20 U.S.C. §1712 (emphasis added).[18]

Furthermore, remedial orders "are not intended to operate in perpetuity." *Bd. of Educ. of Okla. City Pub. Schs. v. Dowell*, 498 U.S. 237, 248 (1991). Rather, "a district court must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution." *Missouri v. Jenkins*, 515 U.S. 70, 99 (1995). In *Freeman v. Pitts*, 503 U.S. 467, 490 (1992), this Court stated:

> Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system. When the school district and all state entities participating with it in operating the schools make decisions in the absence of judicial supervision, they can be held accountable to the citizenry, to the political process, and to the courts in the ordinary course.

The Ninth Circuit intruded on Arizona's fundamental right to impose taxes and allocate revenues for educational purposes. It usurped the power of

---

[18] The NCLB (addressed in detail below) also recognized the need to "strike[ ] the right balance between Federal and State responsibilities . . . recognizing that State and local officials and governments must take the lead in devising ways to implement this vision because they are ultimately closest to the schools with accountability to citizens at the local level." 147 Cong. Rec. 13331 (Dec. 17, 2001) (statement of Senator Bayh).

Arizona's elected representatives to make choices as to how a violation of federal law should be remedied. When compliance was achieved with less drastic remedies, control of funding for schools should have been restored to the State.

D. In this Case, the State of Arizona Achieved Compliance with the EEOA By Performance.

In ruling that Arizona must create an earmarked funding source to comply with §1703(f), the Ninth Circuit not only misconstrued the requirements of §1703(f), but also refused to allow the State to show that the purpose of the statute was fulfilled with less intrusive actions. This not only violates the spirit of federalism, it also runs afoul of the EEOA itself, which prohibits a federal court from imposing a broader than necessary remedy to cure a statutory violation. *See* EEOA §1712.

In this case, the undisputed evidence demonstrated that NUSD's programs were functioning effectively by 2007. Seven years after the original 2000 order was entered, the NUSD ELL program had undergone a complete overhaul including a reorganization of programming, management, and, indeed, even funding. By focusing *only* on the source of funding instead of these vast improvements in NUSD's performance, the Ninth Circuit extended the remedy for the original violation far beyond that which the EEOA was designed to protect. Contrary to the Ninth

Circuit's analysis, the EEOA does not guarantee every ELL student a specific amount of earmarked funding. Rather, it guarantees every ELL student "appropriate action" to assist them in overcoming their language barriers. The record is clear that "appropriate action" was taken in this case.

1. Performance By Effective ELL Programs.

The Ninth Circuit minimized uncontradicted testimony that NUSD now conducts an effective ELL program and that the adverse conditions described in the original 2000 order no longer exist, and, instead, compared the performance of ELL students on Arizona's "AIMS" academic achievement tests to their English-speaking counterparts, to reach the conclusion that the NUSD's progress is limited because ELL students lag behind *all* students in terms of ELL scores on AIMS. App. 32; 36-38. Reliance on such test scores to measure the effectiveness of an ELL program is misplaced and inappropriate.[19] AIMS tests

---

[19] Indeed, the Ninth Circuit ignored the inconvenient fact that the more affluent Scottsdale Unified School District spends more than twice as much money as does NUSD for its ELL students, yet Scottsdale's ELL 10th graders score worse on Arizona's AIMS academic achievement tests than NUSD's ELL 10th graders. (TE 12; TE 7, p. 3; TE 219; TE 245). This drives home the point that requiring Arizona to provide a dedicated stream of income is not the critical factor in determining positive outcomes for ELL students. What is critical is effective school management and good ELL programs. "It is

(Continued on following page)

are given in English. ELL students are not yet proficient in English. It is self-evident that ELL students would not do as well on AIMS and would certainly lag behind those who are literate in English. Any ELL student who passed the AIMS test when taken must have been proficient or he could not have passed those tests. It is profoundly unrealistic to expect an equal percentage of ELL students to pass AIMS as English proficient students. Yet, this is precisely what the Ninth Circuit demanded before deeming Arizona in compliance with the EEOA. This fundamental misunderstanding by the Ninth Circuit underscores the need for judicial restraint.

The Ninth Circuit's flawed focus on test scores is matched by its striking failure to discuss NUSD's achievements on its annual measurable achievement objectives (AMAO), NCLB's accountability standards for ELL students. An AMAO requires a showing that ELL students are progressing in learning English, attaining proficiency, and making adequate yearly progress (AYP). 20 U.S.C. §6842. Arizona instituted proficiency tests that were aligned to its English language proficiency standards to measure the extent to which ELL students were progressing towards and attaining proficiency and complying with AYP requirements. Tr.Day1, pp.48-52, 185. The

---

beyond the competence of the courts to determine appropriate measures of academic achievement. . . . The law does not require perfection." *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 576 F. Supp. 1503, 1518-19 (D. Colo. 1983).

federal government under NCLB requires specific percentages of ELL students to show gains in all three categories and these are documented on an AMAO. Tr.Day1, pp.186-187. NUSD's ELL students exceeded these standards in every category, which means that sufficient numbers of ELL students not only made appropriate progress in learning English, but also became proficient.

When judged by federal AMAO accountability standards, the result of the new SEI program clearly demonstrated "appropriate action." ELL students are classified into five different levels of proficiency: Pre-Emergent, Emergent, Basic, Intermediate, and Proficient. In 2006, the federal government required 12% of each school districts' ELL population to (1) improve their proficiency by one level, (2) attain proficiency, and (3) pass AIMS. Tr.Day1, pp.185-190. At NUSD, in 2006, the percentage of NUSD's ELL students achieving progress by advancing one level varied from 70% to 88%. App. 312. The percentage of NUSD's students who became proficient in English so as to be reclassified as non-ELL students ranged from 29% to 38%. *Id.* Finally, at every grade level, NUSD's ELL students met the federal government's AMAO accountability standards. These numbers show that NUSD's ELL students are vastly exceeding federally approved standards, overcoming language barriers, and able to participate in their school's English instructional programs.

Not only are ELL students at NUSD becoming English proficient in large numbers, but once proficient, these reclassified students scored as well on Arizona's AIMS tests as NUSD's English speaking students. This is demonstrated by a table produced by Plaintiffs' witness, Dr. Zamudio. App. 310, 311. For example, reclassified ELL third graders, on AIMS, scored 474.3 in mathematics, 477.7 in reading, and 460.1 in writing. English speaking (non-ELL) students for third grade scored 479.0 in mathematics, 473.2 in reading, and 438.8 in writing. Reclassified eighth graders scored 563.6 in mathematics, 524.2 in reading, and 576.6 in writing. English speaking students scored 565.0 in mathematics, 536.7 in reading, and 574.8 in writing. The performance was comparable across all the grades. This data indicates that NUSD's ELL students are achieving proficiency and are able to equally participate in the academic programs of their schools as required under §1703(f). That constitutes performance.

The Ninth Circuit also claimed that NUSD is not meeting federal performance criteria under NCLB. App. 38. It is true that Nogales High School, Pierson Vocational High School (the alternative high school), and Mary L. Welty Elementary School did not make adequate yearly progress under NCLB for fiscal year 2005-06. TE 21. The evidence demonstrated, however, that this had nothing to do with the ELL sub-group. TE 21.

2. Performance By Increased Funding.

The District Court in 2000 was also dealing with a different era when it came to state funding. Major structural changes in the law, including voter initiatives, caused significant infusions of new state money since 2000 for both general funding and designated ELL funding. By passing an override and taxing its citizens, NUSD added significant money, an event unanticipated by the original 2000 order. Uncontroverted evidence demonstrated that monies from state, county, and local sources increased the NUSD maintenance and operations budget from $22,195,385.00 in 2000 to $28,956,939.00 in 2006, while the number of students at NUSD slightly decreased during that time frame. This general funding increase most certainly enabled NUSD to lower class sizes, hire better teachers, and implement remedial, tutoring, and intervention programs for ELL students. TE 229, 246. The Ninth Circuit refused to consider that general funding increases benefited all students, including ELL students. It also overstepped its judicial authority by insisting on a separate funding source (rather than confining its scrutiny to the EEOA requirement of "appropriate action") when current funding is sufficient to operate an effective ELL program.

As a justification for earmarked funding, the Ninth Circuit asserted that NUSD and other school districts should not be forced to take monies from general purpose funds and apply them to ELL programs. It claimed that such a practice would adversely impact

programs for non-ELL students. There was nothing in the evidentiary record to support this claim. In fact, the expansion of general funding inherently benefits *all* students, including ELL students. When increases in general funding lower class sizes, augment staff, achieve greater salaries, permit purchase of additional materials, provide more tutoring, and fund full time kindergarten classes, all students flourish, ELL and non-ELL alike.[20]

> ***A court is not at liberty to issue orders merely because it believes they will produce a result which the court finds desirable.*** The existence of a constitutional violation does not authorize a court to seek to bring about conditions that never would have existed even if there had been no constitutional violation. . . .
>
> ***The task of a remedial decree in a school desegregation case is simply to correct the constitutional violation and to eradicate its effects.*** "As with any equity case, the nature of the violation determines the scope of the remedy." *Swann v. Board of*

---

[20] There was very little evidence in the record regarding non-ELL programs since the evidentiary hearing was focused on ELL programs. However, at NUSD, non-ELL students were taught in appropriate sized classes and by experienced teachers. Tr.Day6, pp.97-98, 107. Further, the reforms instituted by Cooper benefited all students. Dr. Zamudio, in 2006, extolled the performance of NUSD's English proficient students by noting that their scores on Arizona's AIMS tests far exceeded state averages. TE 221, pp.1, 7.

> *Education*, *supra*, 402 U.S. at 16, 91 S.Ct. at 1276.

Evans v. Buchanan, 555 F.2d 373, 379-80 (3d Cir. 1977) (emphasis added).

This Court admonished in *Missouri v. Jenkins*, that remedies must be narrowly tailored to cure the conditions that violate federal law. 515 U.S. at 88. To do that, there needs to be a clear understanding of the conditions requiring correction. Further, to assure that the remedy is narrow, it is critical to devise the least intrusive means to solve the identified problems. The Ninth Circuit, in its entire opinion, never addressed the fundamental issue of whether "appropriate action" was provided by an ELL program that was reasonably calculated to overcome language deficiencies so that ELL students could achieve academically. Nor did it even identify specific problems at NUSD which amounted to a violation of federal law.

The reason that the Ninth Circuit failed to identify remaining deficiencies in the ELL program that violated federal law is that those prior deficiencies were cured. Every expert who opined on the condition of NUSD's ELL program found it to be effective and in compliance with §1703(f). Even Plaintiffs' own witness, Dr. Zamudio, testified to current compliance with §1703(f). He stated:

> Q. With your current ELL program, it is an effective program but it can become better? Have I said that right?

A. Yes sir.

. . . .

Q. Your district currently meets federal requirements relative to English language learners, correct?

A. To my knowledge, we make every assurance that we meet the requirements set forth.

Tr.Day6, pp.84, 98.

Despite the undisputed evidence that NUSD's ELL students are now receiving an equal and adequate education, the Ninth Circuit also claimed that Rule 60(b)(5) relief was still inappropriate. In so doing, it urged that the original 2000 order required Arizona to increase its Group "B" weight funding to cover the incremental costs of ELL programs. App. 49, 67-69. It further asserted that the Superintendent's positions, even if true, constitute an end run around a final judgment that was not appealed. App. 51, 61-63.

Contrary to the Ninth Circuit's ruling, there was no directive in the original 2000 order that an earmarked funding source was required to correct the violation of §1703(f). Indeed, the opposite is true. There would have been no need to discuss base level funding, overrides, Group "B" weight funds, and other sources of income if the District Court believed that only one source of money could be utilized to pay the costs of ELL programming and cure a §1703(f) violation.

In addition, the original 2000 order was not focused solely on funding. It connected funding to detailed findings relating to a dysfunctional system in which substantial numbers of ELL students received no ELD instruction, a dysfunctional system that has since been eradicated. Rule 60(b)(5) relief was therefore appropriate.

II. NCLB'S SPECIFIC STANDARDS FOR THE IMPLEMENTATION OF ADEQUATE ELL PROGRAMS SHOULD BE USED TO DEFINE THE MEANING OF "APPROPRIATE ACTION" UNDER THE EEOA.

A. The Meaning of a General Statute May Be Defined by Subsequent, More Specific Legislation Addressing the Same Subject Matter.

To the extent that the term "appropriate action" is not defined in the EEOA and is ambiguous, as acknowledged in *Guadalupe Organization, Inc. v. Tempe Elem. School Dist. No. 3*, 587 F.2d 1022 (9th Cir. 1978) and *Castañeda v. Pickard*, 648 F.2d 989 (5th Cir. 1981), it is well settled that subsequent legislation may be considered to interpret prior legislation on the same subject. *Busic v. United States*, 446 U.S. 398 (1980); *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Great Northern R. Co. v. United States*, 315 U.S. 262 (1942); *State v. Oregon Short Line R. Co.*, 617 F. Supp. 207 (D. Idaho 1985). Further, different statutes which address the same subject matter should be read together such that the

ambiguities in one may be resolved by the other. *Firstar Bank, N.A. v. Faul*, 253 F.3d 982 (7th Cir. 2001).

"At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000). The "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." *United States v. Fausto*, 484 U.S. 439, 453 (1988). In other words, "a specific policy embodied in a later federal statute should control our construction of [an earlier] statute, even though it ha[s] not been expressly amended." *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998).

B. Although the General Phrase "Appropriate Action" Used in the EEOA Is Ambiguous, the NCLB Contains More Specific Guidelines for the Implementation of Adequate ELL Programs to Satisfy the Statutes' Identical Goals.

Section 1703(f) of the EEOA obligates the State to take "appropriate action to overcome language barriers" that prevent ELL students from equal participation in the educational process. As noted

above, the statute does not define "appropriate action."[21] Courts have grappled with the meaning of "appropriate action." In *Guadalupe*, the Ninth Circuit noted that there is "very little legislative history" for §1703(f) and that there had been no decision interpreting the "appropriate action requirement" of §1703(f). 587 F.2d at 1030. Later, in *Castañeda*, the Fifth Circuit judicially crafted a three-part test to give definition to the words "appropriate action."[22] The *Castañeda* court also described the lack of legislative history to divine congressional intent, but stated two things about the words "appropriate action." First, it underscored that the vague term "appropriate action" meant that state and local authorities were to have a "substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations" under §1703(f). 648 F.2d at 1009. Second, the *Castañeda* court observed that the lack of Congressional guidance as to the meaning of "appropriate action" forced that court to prescribe standards, although it was "ill equipped to do so" and such a task was better

---

[21] "[I]t is noted that the legislative mandate to take 'appropriate action to overcome language barriers' appearing in §1703(f) is not a particularly helpful contribution." *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 576 F. Supp. 1503, 1521 (D. Colo. 1983).

[22] The three prong test requires an educational agency to (1) adopt a recognized educational theory; (2) provide programs reasonably calculated to implement the theory; and (3) show, after a period of time, that language barriers are being overcome. 648 F.2d at 1009-10.

"reserved to other levels and branches of government." *Id.*

In contrast to the vague "appropriate action" standard set forth in the EEOA, in promulgating NCLB, Congress has now prescribed those standards which the *Castañeda* court previously lamented were lacking. NCLB specifically includes within its scope, improving the academic achievement of language instruction for limited English proficient and immigrant students (20 U.S.C.A. §6801 *et seq.*). Essentially, NCLB requires states receiving Title I and Title III funds to develop challenging academic content and student achievement standards that will be used by the state and local school districts to carry out the goals of Title I. *Id.*

If a later specific statute with the same purpose as an earlier vague statute is not used to define the vague terms, then a dilemma results: courts must develop specifics to enforce the vague terms, and, to the extent that they are inconsistent with the later statute, states are subjected to two sets of inconsistent requirements. NCLB prescribes a series of programs that a state must undertake so that ELL students achieve English fluency and academic achievement: certification of English fluency of teachers (20 U.S.C. §6826(c)); scientifically based research plan for teaching English (20 U.S.C. §6826(d)(2)); effective language curricula (20 U.S.C. §6826(d)(4)); establishment of proficiency standards and benchmarks with proficiency standards aligned to the State's academic standards (20 U.S.C. §6823(b)(2));

annual assessments to measure proficiency (20 U.S.C. §6823(b)(3)(D)); submission of detailed plans to the United States Department of Education setting forth standards, objectives, and school district accountability (20 U.S.C. §6823(b) & (c)); detailed school district plans to improve proficiency and academic learning (20 U.S.C. §6826(a) & (b)).

1. Goals of the EEOA and NCLB are Identical.

The purpose of both EEOA §1703(f) and NCLB is to ensure that there are effective ELL programs. The stated statutory purpose of NCLB with respect to ELL students is:

> ***To help ensure that children who are limited English proficient***, including immigrant children and youth, ***attain English proficiency***, develop high levels of academic attainment in English, ***and meet the same challenging State academic content and student achievement standards as all children are expected to meet***.

20 U.S.C. §6812(1) (emphasis added). In adopting this stated goal, Congress expressed its desire to "mak[e] sure everyone has an equal shot at the American opportunity through quality education." 147 Cong. Rec. 13327 (Dec. 17, 2001). (Statement of Senator Gregg). As stated in EEOA §1703(f), its purpose is "to overcome language barriers that impede equal participation by . . . students in . . . instructional

programs." There is no daylight between the two statutory goals.

The Ninth Circuit rejected this position and found that the purposes of the two statutes were different. It stated that NCLB is about a "general plan gradually to improve overall performance" of schools, but §1703(f) is an "equality-based civil rights statute" designed to deal with the immediate rights of ELL students.[23] No one disagrees that the two statutory schemes involve different remedies and may, depending on the circumstances, seek to redress different wrongs. EEOA §1703(f), however, requires "appropriate action" which can only mean a program reasonably calculated to teach ELL students English. NCLB actually delineates what programs states must implement to make sure school districts provide ELL students with a reasonable opportunity to learn English. In this fashion NCLB supplements and defines EEOA §1703(f). *See FDA v. Brown &*

---

[23] To the contrary, NCLB actually does contain a mechanism for individual students to file a complaint when their ELL programs are inadequate in one way or another. An NCLB complaint of this nature would be dealt with on an administrative level and resolved ultimately by the United States Department of Education if not resolved by a local or state agency. Accordingly, under *both* the EEOA and NCLB, a student need not wait "year after year" to pursue immediate relief for an alleged violation of his or her right to equal and adequate educational opportunities. *Compare Flores*, 516 F.3d at 1173 (Pet. App. 76) *with* 20 U.S.C. §7844(a)(3)(C). Arizona's NCLB complaint procedures are available at http://www.ade.az.gov/asd/Title1/PrivateSchoolSvcs/Complaint_Procedures.doc.

Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) ("[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.").

2. The Meaning of "Appropriate Action" Under the EEOA Should Be Determined By NCLB's Specific Standards.

A change in law will factor heavily in warranting Rule 60(b)(5) relief in public interest litigation. *Agostini v. Felton*, 521 U.S. 203 (1997). The United States Department of Education is now deeply involved in the education of ELL students under NCLB. NCLB requires states to ensure that ELL theories of instruction are scientifically informed, that effective programs are instituted, and that positive results are obtained with accountability standards. NCLB, in essence, fleshes out the three-prong test in *Castañeda* to ensure that ELL students "overcome language barriers" so they can "participate in instructional programs." The subsequent and detailed statutory scheme of NCLB should control the interpretation of the prior enacted and general statute, §1703(f), when, as here, both statutes touch upon the same area and seek to achieve the exact same purpose. *See United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998) ("[A] specific policy embodied in a later federal statute should control our construction of [an earlier]

statute, even though it ha[s] not been expressly amended.").

C. Because Arizona Has Satisfied the Specific Standards For Its ELL Programming Set Forth Under NCLB, It Has Taken "Appropriate Action" Under the EEOA.

Arizona put into place an extensive curricular and instructional foundation to demonstrate to the federal government that Arizona school districts meet the programmatic and accountability requirements imposed by NCLB. Every other state receiving funding under NCLB must also meet these fundamental requirements. The federal government deems Arizona in compliance with NCLB and Arizona has worked closely with the United States Department of Education to ensure that its programs meet with federal approval. Tr.Day1, pp.36-45, 47, 50, 55, 65, 70, 158, 160, 187.

It is both unfair and irrational for the federal government, on one hand, to approve Arizona's ELL programs as effective under NCLB, but, on the other hand, for the Ninth Circuit to rule that Arizona has failed to take "appropriate action" to assure effective ELL programs under EEOA §1703(f). States should not be subject to the vague requirement and inconsistent interpretations of "appropriate action" under EEOA §1703(f) when NCLB spells out in detail the definition of what is "appropriate." States should be

subject to only one standard – the standard spelled out by Congress in NCLB and implemented by the United States Department of Education.

D. Interpreting the EEOA and NCLB Consistently Will Not Result in A "Repeal By Implication."

The Ninth Circuit refused to reconcile its interpretation of the EEOA with the specific policies and programs set forth in the subsequently enacted NCLB. Instead, it narrowly focused on the accountability requirement of NCLB which requires ELL students to meet "annual measurement achievement objectives ['AMAO'] . . . including . . . making adequate yearly progress ['AYP']" and concluded that acceptance of the Superintendent's position would effectively repeal §1703(f). App. 73. The Ninth Circuit claimed that if an AMAO was met one year and not the next, enforcement rights under §1703(f) would "wink in and out of existence." App. 77.

The Superintendent never claimed that NCLB negated the EEOA. An individual ELL student, in a proper case, would be entitled to bring an action under §1703(f) to remedy abuses which denied that student an opportunity to learn English. No claim is being made that the EEOA has no validity. But that is not what this case is about. This case is not about an individual student who was denied ELL services at a particular school. Ultimately, this case has

morphed into an assertion that Arizona systemically failed to ensure that there was effective ELL programming at NUSD and has thus failed to "take appropriate action" under the EEOA. However, NCLB was designed to ensure that states remedy systemic inadequacies and provide effective programs and positive outcomes for ELL students. That is why, in determining a systemic inadequacy, NCLB should be used as the measure of whether "appropriate action" has been achieved.

Writing for the majority in *Fausto,* Justice Scalia explained the difference between the argument that a statute has been "repealed by implication" and the argument that a *judicial interpretation* of a statute has been impliedly rejected by a later Act –

> ***Repeal by implication of an express statutory text is one thing***; it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change. ***But repeal by implication of a legal disposition implied by a statutory text is something else.*** The courts frequently find Congress to have done this whenever, in fact, they interpret a statutory text in the light of surrounding texts that happen to have been subsequently enacted. This classic judicial task of reconciling many laws enacted over time, and getting them to "make sense" in combination, necessarily assumes that ***the implications of a statute may be altered***

> ***by the implications of a later statute.*** And that is what we have here.

Fausto, 484 U.S. at 453 (emphasis added). The Superintendent here argues that there is no repeal. Rather, the latter statute gives specifics for an earlier vague statute that has an identical purpose.

Arizona now complies with the extensive accountability system of NCLB to ensure that ELL students master English and meet challenging academic requirements. The extensive requirements of NCLB for ELL students did not exist when the original 2000 order issued. They do now, and states know what they must do to comply with federal mandates regarding the advancement of ELL education. Arizona complies with those mandates. It is illogical for the Plaintiffs to claim that Arizona can simultaneously comply with the stringent requirements of NCLB and still violate the vague requirement of §1703(f) to "take appropriate action."

III. Conclusion.

This case concerns the power of the federal judiciary to require the State of Arizona to provide earmarked funding for ELL students as the sole means of satisfying a judgment declaring Arizona to be in violation of §1703(f) of the EEOA. Here, the Ninth Circuit required special funding although the purpose of §1703(f) was fulfilled by general funding increases, delivery of new state programs, the enactment of NCLB, and better management of ELL

services. The Ninth Circuit exceeded its powers and overrode notions of federalism, comity, and the need to tailor the scope of the remedy to fit the statutory violation. Further, the vague "appropriate action" requirement of EEOA §1703(f) should be interpreted in the context of the subsequently enacted specific standards pursuant to Congress' NCLB Act. States should not be left exposed to claims that they violated the EEOA when they are in full compliance with NCLB. The two statutes should be reconciled and interpreted consistently.

For all of the foregoing reasons, Petitioner respectfully requests that the decision of the Ninth Circuit be reversed and that the relief requested by the Rule 60(b)(5) motions be granted.

Respectfully submitted,

ERIC J. BISTROW,
Counsel of Record
DARYL MANHART
MICHAEL S. DULBERG
MELISSA G. IYER
BURCH & CRACCHIOLO, P.A.
702 E. Osborn, Suite 200
Phoenix, Arizona 85014
phone: 602-274-7611
fax: 602-234-0341

Attorneys for
Petitioner Superintendent

February 19, 2009

RESPONDENT'S BRIEF

Nos. 08-289 and 08-294

FILED
MAR 18 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF ARIZONA,

Petitioner,

v.

MIRIAM FLORES, et al.,

Respondents.

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES and PRESIDENT OF THE ARIZONA SENATE,

Petitioners,

v.

MIRIAM FLORES, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS STATE OF ARIZONA AND ARIZONA STATE BOARD OF EDUCATION

TERRY GODDARD,
Attorney General
MARY O'GRADY,
Solicitor General
SUSAN P. SEGAL,
Assistant Attorney General
OFFICE OF THE ARIZONA
ATTORNEY GENERAL
1275 West Washington
Phoenix, Arizona 85007

ROBERT H. MCKIRGAN
LAWRENCE A. KASTEN
DAVID D. GARNER
KIMBERLY ANNE DEMARCHI
Counsel of Record
LEWIS AND ROCA LLP
40 North Central Avenue
Phoenix, Arizona 85004
(602) 262-5728

March 18, 2009

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TC x TR

4EH URA

TABLE OF CONTENTS

	Page
INTRODUCTION	1
STATEMENT OF THE CASE	2
I. Procedural History of This Litigation Before the Rule 60 Motions	2
a. Complaint and Judgment	2
b. Initial Post-Judgment Orders	3
c. Enactment of Interim Legislation	4
d. Post-Cost Study Legislation and Order Setting Deadline to Comply	7
II. Enactment of HB 2064	8
a. The Per-Student Funding Provisions of HB 2064	8
b. The Compensatory Instruction Fund	11
c. The Two-Year Limit	12
III. The Rule 60(b)(5) Motions	13
a. Motions to Consider HB 2064 and to Purge Contempt	13
b. Initial Decision on HB 2064 and the Motion to Purge Contempt	17
c. Proceedings After Remand	17
d. Current Status of the Federal Funding Offsets and the Two-Year Limit	19
SUMMARY OF ARGUMENT	20

TABLE OF CONTENTS – Continued

Page

ARGUMENT 22

I. Current Law Must Be Considered in Ruling on a Motion for Relief from Judgment Under Rule 60 22

II. Compliance with NCLB Is Not Equivalent to Compliance with the EEOA 24

CONCLUSION 29

TABLE OF AUTHORITIES

Page

Cases:

Agostini v. Felton, 521 U.S. 203 (1997) 18, 22

Alliance for Children, Inc. v. City of Detroit Pub. Sch., 475 F. Supp. 2d 655 (E.D. Mich. 2007) 27

Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006) 26

Ass'n of Cmty. Orgs. for Reform Now v. N.Y. City Dep't of Educ., 269 F. Supp. 2d 338 (S.D.N.Y. 2003) 27

Bd. of Educ. of Oklahoma City Pub. Sch. v. Dowell, 498 U.S. 237 (1991) 22, 23

Bennett v. Kentucky Dep't of Educ., 470 U.S. 656 (1985) 16

Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981) 27

Frew v. Hawkins, 540 U.S. 431 (2004) 22

Hook v. Arizona Dep't of Corr., 107 F.3d 1397 (9th Cir. 1997) 22

Lewis v. Casey, 518 U.S. 343 (1996) 22

Morton v. Mancari, 417 U.S. 535 (1974) 25

Newark Parents Ass'n v. Newark Pub. Sch., 547 F.3d 199 (3d Cir. 2008) 27

Rizzo v. Goode, 423 U.S. 362 (1976) 22

Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992) 18, 22, 23

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS:

Ariz. Const. art. XI, § 1(A) 8

STATUTES:

20 U.S.C. §§ 1234a-1234b 16
20 U.S.C. § 1234d 16
20 U.S.C. § 1703(f) ..... *passim*
20 U.S.C. § 1706 27
20 U.S.C. § 6842 ..... 24, 25
20 U.S.C. § 6847 25
20 U.S.C. § 7902 ..... 15, 24
20 U.S.C. § 7907 26
A.R.S. § 15-543 9
A.R.S. § 15-751 4
A.R.S. § 15-752 4
A.R.S. § 15-756.01 ..... 10, 11, 12
A.R.S. § 15-756.04 12
A.R.S. § 15-756.05 13
A.R.S. § 15-756.11 ..... 12, 13
A.R.S. § 15-943 ..... 9, 12
A.R.S. § 15-971 9

TABLE OF AUTHORITIES – Continued

Page

RULES AND REGULATIONS:

Fed. R. Evid. 201 19

Fed. R. Civ. P. 60 ..... 1, 19, 22, 24

Fed. R. Civ. P. 60(b) 1, 20, 22, 23

Fed. R. Civ. P. 60(b)(5) 14, 17, 20, 29

OTHER AUTHORITIES

HB 2010, 2001 Ariz. Sess. Laws ch. 9 ..... 4, 5, 6

HB 2064, 2006 Ariz. Sess. Laws ch. 4 9

INTRODUCTION

The State of Arizona and the Arizona State Board of Education (collectively "the State") are in the unusual position of being Respondents to Petitions for Certiorari filed by three of Arizona's elected officials. Those officials asked the lower courts to disregard certain requirements in Arizona law when examining the appropriateness of relief from a federal court order requiring compliance with the Equal Educational Opportunity Act of 1974, 20 U.S.C. § 1703(f) ("EEOA").

The state statute in question attempts to reduce or offset the State's funding obligations under the EEOA by taking into account federal funding received by some schools and districts. By doing so, the statute jeopardizes some $600 million per year in federal funding for all Arizona students. To preserve access to that funding for all Arizona's children, the State took the position below that relief from the judgment was not appropriate at this time, given the provisions of current state law.

The trial court correctly understood the important interplay between state and federal education funding when it determined that Arizona law, as currently in place, was not sufficient to comply with the court's prior judgment and denied Rule 60(b) relief. The court of appeals' opinion, while not without deficiencies, correctly affirmed the trial court's decision.

In this brief, the State addresses the standard for relief under Rule 60(b) and the relationship between the EEOA and the No Child Left Behind Act ("NCLB"). In addition, this brief attempts to give the Court a better understanding of the relationship between education funding options available to the State and its continued access to federal funding, since this relationship was crucial to the decisions below. Petitioners largely do not address these points or their role in the lower court decisions, necessitating a more complete discussion of the history of this litigation.

STATEMENT OF THE CASE

I. Procedural History of This Litigation Before the Rule 60 Motions.

a. Complaint and Judgment.

Plaintiffs, parents and students from the Nogales Unified School District ("NUSD"), filed this lawsuit in 1992, naming as Defendants the State of Arizona, the Arizona State Board of Education, and the Superintendent of Public Instruction for the State of Arizona (collectively, "the State Defendants"). Plaintiffs asked for declaratory relief regarding Arizona's alleged failure to comply with, among other things, its obligations under the EEOA to "take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." (Joint Appendix ("JA") 1-18.)

In January 2000, the district court entered a declaratory judgment in favor of Plaintiffs on their EEOA claim, noting various deficiencies in the NUSD English Language Learner (ELL)[1] instructional program and concluding that the State funding for ELL instruction was arbitrary and capricious and bore no relation to the actual funding needed to meet the State's obligations under the EEOA. (Appendix to Intervenors' Petition in No. 08-294 ("Int. Pet. App.") 150a.)[2] The State Defendants did not appeal from that judgment.

b. Initial Post-Judgment Orders.

In October 2000, the district court ordered the State Defendants to conduct a cost study to determine the proper appropriation that would "effectively implement" its chosen instructional program for ELLs. (JA 37-39.) The district court ordered the State Defendants to comply with the January 2000 judgment by January 31, 2002. (JA 44-45.)

The State did not meet the court's deadline because intervening changes in state law altered the

---

[1] At the time the decision was entered, English Language Learners were referred to as Limited English Proficient or "LEP" students.

[2] The court entered a post-judgment consent order governing the plaintiff's remaining claims. (JA 19; Clerk's Record ("CR") 213.) The State Defendants' compliance with that consent order has been the subject of various motions not relevant to the issues before this Court.

ELL programs whose cost was at issue. In November of 2000, Arizona's voters had passed an initiative that required English immersion and repealed the provisions of Arizona law that authorized school districts to use various models of instruction for students who cannot speak English. A.R.S. §§ 15-751(5), 15-752. As a result, the limited cost information available from the Arizona Department of Education's initial cost study completed in May 2001 did not address the actual cost of implementing the new model of English instruction that Arizona's voters had chosen. (CR 239.)

c. Enactment of Interim Legislation.

Lacking data regarding the costs of Arizona's new English immersion model, Arizona's Legislature enacted legislation in December 2001, designed to address the judgment on an interim basis while it continued to gather information. HB 2010, 2001 Ariz. Sess. Laws ch. 9 (CR 234). That legislation, HB 2010, substantially increased the per-student amount already provided for the ELL instruction and appropriated additional funds for teacher training, compensatory instruction, instructional materials, a literacy pilot program, and monitoring by the Arizona Department of Education. *Id.* HB 2010 also provided funding for a new cost study of ELL instruction, to be completed by August 2004, followed by committee recommendations based on the study in December 2004 for action by the Legislature in the 2005 legislative session. *Id.*

The Plaintiffs responded with a motion for injunctive relief, challenging HB 2010 as inadequate to satisfy the district court's order and characterizing the State's renewed effort to study costs as a stalling tactic. (CR 234.) The State Defendants opposed that motion, pointing to the substantial changes that had made it difficult to assess costs and citing the recent passage of the NCLB. (CR 239.) In light of those changes, the State Defendants contended that HB 2010's approach of increasing interim funding while completing the necessary study was rational and appropriate under the EEOA and the judgment. (*Id.*) The district court granted the Plaintiffs' request for injunctive relief, requiring the completion of a cost study by January 1, 2003 and extending the deadline for the State Defendants' compliance with the judgment to June 30, 2003. (JA 51-52.)

Given that both Arizona's new model of structured English immersion and NCLB would not be fully implemented until the 2002-03 school year, the State Defendants moved for reconsideration of the court's order accelerating the deadline for completion of the cost study. (CR 253.) After considering the motion, the district court entered an order finding that HB 2010 was an appropriate response to the judgment and its prior orders, particularly because the new funding was adopted "as an interim measure pending further study and review." (JA 54.) The district court therefore vacated its prior order, which had set a June 2003 deadline for compliance with the judgment. (*Id.*)

The State contracted with the National Conference of State Legislatures ("NCSL") to prepare the cost study, and, in August 2004, NCSL provided the Legislature with an executive summary and draft of the study. (CR 285.) The Plaintiffs responded with another request that the district court set a deadline for compliance with the January 2000 judgment. (CR 284.) The State Defendants opposed the motion, noting that HB 2010 contemplated that the Legislature would take action in response to the judgment in the 2005 legislative session and that the State remained on track to do so. (CR 285.) The district court rejected the State Defendants' arguments, stating that "the legislature has failed to meet the court's deadlines as well as their own" and expressing concern that ELL students would need to wait another year for relief if the Legislature were to adjourn without enacting legislation that complied with the judgment. (JA 392.) The district court therefore set a deadline of the later of April 30, 2005 or the end of the 2005 legislative session for the State to comply with the judgment. (*Id.*) As it had in its prior orders, the district court did not require enactment of any particular funding mechanism or instructional program, ordering only that the State defendants "comply with the court's January 2000 Order by appropriately and constitutionally funding the state's ELL programs." (*Id.*)

d. Post-Cost Study Legislation and Order Setting Deadline to Comply.

During the 2005 legislative session, the Arizona Legislature passed legislation establishing a system for funding ELL instruction to replace the interim funding provided by HB 2010. (CR 303.) The Governor vetoed that legislation, primarily because it relied on federal funding to fund the State's ELL instructional programs, which she feared would run afoul of federal law. (CR 303.) In August 2005, Plaintiffs filed a motion asking the court to impose sanctions if the State failed to enact legislation within 30 days to bring the State into compliance with the district court's orders. (CR 296.) The State Defendants opposed the sanctions motion and asked the district court for guidance regarding the extent to which the State could rely on federal funding to meet its obligations under the EEOA to rationally fund its chosen ELL instructional programs because the use of federal funds was the key dispute between the Governor and Legislature. (CR 303.)

The district court granted the sanctions motion on December 15, 2005 and gave the State until January 25, 2006 to pass legislation complying with the court's prior orders. (Int. Pet. App. 171a-172a.) If the deadline was not met, daily monetary fines would be imposed, on an escalating scale, until legislation was enacted. The district court declined to address the appropriate use of federal funds, expressing concern that to do so would be to issue an impermissible

advisory opinion. (*Id.* 167a-168a.) The State did not meet the January 25, 2006 deadline.[3]

II. Enactment of HB 2064.

On March 2, 2006, the Legislature passed HB 2064 to comply with the January 2000 judgment. (Int. Pet. App. 333a-334a). On March 3, 2006, the Governor issued a written statement of her intent to allow the bill to become law without her signature, again noting that the bill authorized the same use of federal funds that had motivated her prior veto. (CR 376.) HB 2064 remains the law controlling the funding and provision of ELL instruction in Arizona.

a. The Per-Student Funding Provisions of HB 2064.

Arizona funds the maintenance and operations budgets of its public schools through a combination of state aid and local property taxes. Pursuant to the Arizona Constitution's mandate of a "general and uniform" system of public education, Ariz. Const. art. XI, § 1(A), the funding system applies statewide, and the combination of state and local funding is

---

[3] The State requested permission to distribute fine monies accumulated under the December 15, 2005 order to Arizona school districts for their use in educating ELL students, rather than paying them into the court, and the district court granted that request. (CR 395.) The fines were subsequently vacated by the Ninth Circuit and are not at issue in this petition.

"equalized" to ensure that the funding provided to a school district to educate its students is not limited by the district's property wealth. A.R.S. § 15-971.

The process for equalizing the funds available to a school district is based on the number of students actually enrolled in that district and "weighted" to take into consideration the varying costs associated with educating different students, including their grade level and the size and location of the school district. A.R.S. § 15-943 (calculating "base support level" based on weighted student count). The student count used to calculate maintenance and operations' funding available is also increased to account for additional costs associated with special student needs, including whether the student is an ELL. A.R.S. § 15-543(2)(b).

Consistent with the existing structure of Arizona's school finance system, the additional funding HB 2064 provided to educate ELLs was to be distributed on a per-student basis. The legislation did so through two mechanisms: an increase in the weight allocated to ELL students in calculating a school's base support level (the "Group B weight") and a supplemental funding stream based on additional costs in excess of the Group B weight amount (the "SEI Fund").[4]

---

[4] HB 2064 also provides additional funding for certain purposes through a Compensatory Instruction Fund discussed below.

Specifically, HB 2064 increased the Group B weight for ELL students – the extra amount of funding a school district gets for each ELL student enrolled – from $365 to $444. A.R.S. § 15-756.01.[5] This increase, however, was made expressly contingent on an order from the district court in this litigation finding that HB 2064 "addresses the orders in the case" and, at least on an interim basis, "permit[s the] act to be fully implemented to determine whether the resulting ELL plans and available funding to implement the plans bear a rational relationship to the cost of implementing appropriate language acquisition programs." (Int. Pet. App. 333a-334a (HB 2064, 2006 Ariz. Sess. Laws ch. 4, § 15).) The district court has consistently found that HB 2064 violates federal law, and the increased Group B weight has therefore never taken effect.

The SEI Fund is a new mechanism created by HB 2064 and designed to supplement the Group B weight to the extent necessary to provide districts with State funding that is rationally related to the cost of whatever ELL instructional program it has chosen. To achieve this end, HB 2064 requires the creation of a task force to develop ELL instructional models, followed by submissions from individual school districts regarding the per-student incremental costs associated with adopting one of the approved

---

[5] The entire text of HB 2064, as enacted, appears in the Appendix to the Intervenors' Petition at 268a-334a.

models. A.R.S. § 15-756.01. If the per-student cost of implementing the State-approved instructional model is more than the $365 or $444 per student provided through the Group B weight, then the school district may request additional monies from the SEI Fund. *Id.*

However, under HB 2064, the State does not actually fund the entire incremental ELL instructional cost that is unmet by the Group B weight if the school or district receives federal funds. The school or district must subtract from any request a per-student amount representing the funds received by that school or district under Titles I, II, and III of the Elementary and Secondary Education Act (ESEA), as well as federal impact aid provided to offset the presence of non-taxable lands in the school or district's tax base and desegregation funds raised through local tax revenues. A.R.S. § 15-756.01(I). Under this funding scheme, a school or district that receives federal funds will necessarily receive less in state aid than the full cost of implementing an approved ELL instructional model. In contrast, a school or district that receives no federal or desegregation funds will be eligible to receive state aid equaling the full cost of implementing an approved ELL instructional model.

b. The Compensatory Instruction Fund.

HB 2064 also establishes a compensatory instruction fund ("CIF") which schools may use only for

"programs *in addition to normal classroom instruction* that may include individual or small group instruction, extended day classes, summer school or intersession school." A.R.S. § 15-756.11(G) (emphasis added). The programs are "limited to improving the English proficiency of current English language learners and pupils who were English language learners and who have been reclassified as English proficient within the previous two years." *Id.* Appropriations to, and grants from, the CIF are discretionary. A.R.S. § 15-756.11.

c. The Two-Year Limit.

Group B weight monies, SEI funds, and Compensatory Instruction dollars are all available to ELLs for two years. HB 2064 cuts off both Group B weights and SEI funds for any student who remains classified as an ELL for more than two years: "Monies from the [SEI] Fund established by this section and monies for the ELL support level weight . . . [Group B weights] shall not be distributed for more than two fiscal years for the same pupil." A.R.S. § 15-756.04(C); *see also* A.R.S. § 15-943(2) (including same limitation in Group B weight statute); A.R.S. § 15-756.01(J) (prohibiting school districts from including in their SEI budget request the "incremental costs" of any student "who has been classified as an English language learner for more than two years").

ELLs can continue to receive Compensatory Instruction services so long as they are classified as

ELLs, as well as for two years after they are reclassified as English Proficient. A.R.S. § 15-756.11(G). However, Compensatory Instruction services are limited: HB 2064 specifically defines those services to exclude normal classroom instruction of the type ELLs presumably will receive during the first two years from the Group B weight and SEI funds.[6] *Id.*

III. The Rule 60(b)(5) Motions.

a. Motions to Consider HB 2064 and to Purge Contempt.

On March 3, 2006, the State advised the district court that HB 2064 passed into law without the Governor's signature and moved for accelerated consideration of that legislation so that any deficiencies identified by the court could be remedied during the still-ongoing legislative session. (CR 375, 376.)

On March 8, 2006, the Superintendent of Public Instruction[7] ("Superintendent") requested an evidentiary hearing "to demonstrate that the funding provision of the statute adequately provides for the needs of ELL students" in NUSD. (CR 380.) That same day,

---

[6] ELLs who score at or above a designated score for English proficiency are to be reclassified as English Proficient. A.R.S. § 15-756.05(B). English Proficient students can receive Compensatory Instruction services only for two years after their reclassification. A.R.S. § 15-756.11(G).

[7] The Superintendent obtained separate representation in September 2005. (CR 316.)

the Speaker of the Arizona House of Representatives and the President of the Arizona Senate (the "Intervenors") moved to intervene, principally to "defend the plan for English Language Learners . . . adopted by the Arizona Legislature in H.B. 2064." (JA 56.) Attached to the motion to intervene was a proposed motion to "purge the State of Arizona of contempt" based on the passage of HB 2064, both in itself and when considered in conjunction with other reforms of Arizona education, including other sources of available funding. (JA 65.) The draft motion to purge contempt also contended that NCLB had preempted the EEOA and precluded federal court orders prescribing any relief other than compliance with the NCLB's regulatory process. (JA 73-77.)

The district court granted the motion to intervene and ordered expedited, simultaneous briefing by all parties regarding both HB 2064's adequacy as a response to the orders requiring compliance with the judgment and the Intervenors' motion to purge the State of contempt. (CR 381, 390.)

On the deadline to submit an opening brief regarding the adequacy of HB 2064, the Intervenors filed a revised version of their motion to purge the State of contempt. (CR 422.) This version still included the argument that HB 2064 complied with the court's prior orders and January 2000 judgment both on its own and when viewed in conjunction with other available funding. (*Id.*) It also added a new claim for relief, invoking Rule 60(b)(5) to move for relief from

the judgment based on both satisfaction of the judgment and preemption of the EEOA by NCLB.[8] (*Id.*)

The Superintendent filed a memorandum supporting HB 2064 as "meet[ing] the spirit of prior orders" and asked the district court to provisionally approve the bill and retain jurisdiction for a year to determine how it was working. (CR 414.) The Superintendent also joined the Intervenors' motion to purge contempt. (CR 433.)

The State filed a brief analyzing HB 2064 and its compliance with the court's prior orders. The State's brief identified three potential problems with the statutory scheme created by HB 2064:

> (1) by factoring available federal funding into its calculation of the amount of state aid to be provided to schools and districts through the SEI fund, it ran afoul of NCLB's prohibition on considering federal funds in determining the amount of state aid (20 U.S.C. § 7902);
>
> (2) by deducting federal funds from the amount of state aid distributed through the SEI fund, it also ran afoul of the Elementary and Secondary Education Act ("ESEA") prohibitions on using federal educational funds to supplant (rather

[8] Specifically, the Intervenors' Rule 60(b) motion sought relief from the January 2000 judgment and three orders setting deadlines for compliance with that judgment (CR 222, 290, and 335). (*Id.*)

than supplement) state funds (20 U.S.C. §§ 6314(a)(2)(B), 6315(b)(3), § 6613(f), 6623(b), 6825(g)); and

(3) by cutting off most ELL instructional funding after two years without providing an exception for students who still had not achieved language competence, it ran afoul of the EEOA itself.

(CR 415.) As the State noted in its brief, it raised the federal funding issues (on which it had previously sought the court's guidance) because the penalties for violating the NCLB and ESEA provisions could include denying future federal education funding to Arizona entirely, potentially affecting more than half a billion dollars per year in funding relied on by all of Arizona's students. *Id.*; *see also* 20 U.S.C. § 1234a-1234b, 1234d; *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 665 (1985).

With regard to the motion to purge contempt, the State disputed that Arizona was in contempt of any court order because it had passed HB 2064 in an attempt to comply with the court's judgment. (CR 416.) The State noted that, while it had raised concerns regarding the use of federal funds and the two-year cutoff of funding, even a finding that HB 2064 was inadequate to comply with the judgment would not put Arizona in contempt of court or automatically reinstate the fines imposed by the court's prior order. (*Id.*)

b. Initial Decision on HB 2064 and the Motion to Purge Contempt.

After briefing and argument, the district court concluded that HB 2064 did not comply with its prior orders and judgment because its two-year limitation and offset of federal funds violated federal law. (Int. Pet. App. 181a-186a.) The Ninth Circuit reversed the district court's decision in an unpublished memorandum disposition, holding that the district court should have conducted an evidentiary hearing on the Superintendent's and Intervenors' claims of changed factual circumstances sufficient to justify relief from the judgment under Rule 60(b)(5). (*Id.* 189a-190a.)

c. Proceedings After Remand.

At the conclusion of an evidentiary hearing on remand, the district court again held that the State Defendants had not yet complied with its prior orders and judgments, regardless of any improvements in ELL instruction in NUSD, because HB 2064 violates (1) the NCLB's prohibition on consideration of federal funds, (2) the ESEA's prohibition on using federal funds to supplant state aid to schools, and (3) the EEOA by categorically denying funds to support classroom instruction of any ELL student who has not achieved proficiency in two years. (Int. Pet. App. 113a-115a.) In a subsequent order, the district court suggested that the State was nearing compliance, noting that the problems with HB 2064 could be fixed

by removing the federal offsets and two-year limitation. (*Id.* 90a; JA 88-90.)

The Ninth Circuit affirmed. Applying the standards this Court articulated in *Agostini v. Felton*, 521 U.S. 203 (1997) and *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), it found that the district court did not abuse its discretion to modify the judgment because neither the underlying facts nor the governing law had changed sufficiently. (Int. Pet. App. 49a-50a, 59a-61a.) The Ninth Circuit examined the proffered changes of fact and law and found each insufficient to call for modification of the judgment. On the issues of fact, the Ninth Circuit concluded that the moving parties had failed to demonstrate either that the extra help needed by ELL students no longer costs extra money or that the per-student funding chosen by the Legislature as the means of meeting those costs was enough to do so, particularly in light of continued problems with student performance in the Nogales district. (*Id.* 63a-72a.) On the issues of law, the Ninth Circuit found that NCLB neither expressly nor impliedly preempted EEOA and that NCLB's monitoring of statewide improvement differed from the EEOA's guarantee that the State will provide to each ELL child the educational support necessary to overcome language barriers. (*Id.* 72a-81a.) The Ninth Circuit concluded that the district court correctly focused on HB 2064 and found that that legislation violated NCLB (by considering

federal funds) and the EEOA (by limiting most ELL funding to two years). (*Id.* 81a-90a.)[9]

d. Current Status of the Federal Funding Offsets and the Two-Year Limit.

As noted in his petition, the Superintendent is not enforcing the federal funding offsets or the two-year cap in HB 2064 because of the district court's injunctive order forbidding implementation of those provisions. (Superintendent's Reply in Support of Petition in No. 08-289 at 10-11 & n.7.) However, the Legislature has not amended Arizona's statutes to eliminate those requirements, which would once again be binding on the Superintendent and other State officials if the district court's injunctions in this case are vacated or otherwise lifted.

The United States Department of Education has formally warned the Superintendent that Arizona could face the loss of federal funds or be required to return previously received federal funds if it implements the offset provisions of HB 2064 as written.[10] (App. 1-4.)

---

[9] The Ninth Circuit declined to reach the issue of HB 2064's violation of the restriction on supplanting, which it deemed unnecessary to its decision. (*Id.* at 88a-89a n.53.)

[10] The Department of Education's June 2008 letter was issued after the conclusion of the evidentiary proceedings on the Rule 60 motions held in the district court. It is subject to judicial notice under Fed. R. Evid. 201 and a copy has been included in the Appendix.

SUMMARY OF ARGUMENT

The position of the State with regard to the questions presented by the Petitions remains limited to those issues exposing Arizona to the potential loss of federal educational funds and to further litigation regarding compliance with federal law.

With regard to the proper standard for Rule 60(b) relief, under this Court's decisions, the current state of facts and law are necessarily relevant when determining whether to grant relief from a judgment under Rule 60(b)(5). Relief from a judgment is not appropriate if it would permit or perpetuate a violation of federal law. In this case, Arizona law, as amended by HB 2064, requires State officials to consider and deduct federal education funds when allocating State ELL funding to school districts. These setoffs would violate the NCLB and jeopardize more than half a billion dollars per year in federal educational funding provided for Arizona students. Arizona officials are not implementing these provisions because of the district court's injunction now in place, but the State would be required to fully implement them if the injunction is lifted as Petitioners request. Because of the flaws in HB 2064 the district court did not abuse its discretion in denying Rule 60(b) relief.

Nonetheless, the State does not agree with the Ninth Circuit's statements that federalism concerns are somehow limited in this case because Arizona's elected officials have disagreed regarding this important

legal issue. Concerns about minimizing judicial intrusions into State governance are always present when injunctive relief against State officials is at issue.

With regard to the relationship between EEOA and NCLB, the State disagrees with the Petitioners' contention that NCLB now sets the standard for compliance with the EEOA's "appropriate action" requirement. The NCLB, as a statute enacted under Congress' Spending Clause authority, is optional for States. Only if they choose to accept federal funding must the States follow its stringent and detailed requirements for educational programs. A finding that the NCLB was intended to set forth standards for complying with the EEOA would eliminate the choice Congress intended to provide by mandating NCLB compliance in even those States that have declined federal funding.

Moreover, Congress authorized private rights of action for EEOA violations, but did not do so for NCLB. Equating the two statutes would expose States to private suits alleging violations of NCLB, by importing the EEOA's private right of action into a statute that was written to contain no such right.

ARGUMENT

I. Current Law Must Be Considered in Ruling on a Motion for Relief from Judgment Under Rule 60.

The Petitioners' discussion of the standard applicable to a State officer's Rule 60 motion appropriately focuses on the flexibility with which federal courts must apply existing judgments to the changes in factual and legal circumstances that arise after entry of those judgments. Undue rigidity would both be unjust and intrude unnecessarily into the decisions entrusted to State officials. *See Frew v. Hawkins*, 540 U.S. 431, 441-42 (2004); *Agostini*, 521 U.S. at 203; *Bd. of Educ. of Oklahoma City Pub. Sch. v. Dowell*, 498 U.S. 237, 247 (1991); *Rufo*, 502 U.S. at 385, 393 & n.14.

The Ninth Circuit incorrectly indicated that the State's positions in this case eliminated the federalism concerns that would otherwise be present in a case involving relief against State officers. As Petitioners rightly state, the disagreement among State officers in this case does not eliminate federalism concerns or alter the 60(b) analysis in any fashion. A Rule 60 request by any State actor raises the same federalism concerns as a Rule 60 motion joined by every State official. *Cf. Rizzo v. Goode*, 423 U.S. 362, 379-80 (1976) (discussing federalism issues inherent in enjoining conduct of State officials); *Lewis v. Casey*, 518 U.S. 343, 385-87 (1996) (Thomas, J., concurring) (same); *Hook v. Arizona Dep't of Corr.*, 107 F.3d 1397, 1402 (9th Cir. 1997) (injunction against State actors

requires scrutiny to ensure it is no broader than necessary to assure their compliance with federal law).

Moreover, the State did not "abandon its defense of the suit," "largely side[ ] with Flores," or "wish the injunction to remain in place" as the Ninth Circuit stated. (Int. Pet. App. 28a, 52a.) As set forth in some detail above, the State has consistently opposed efforts to hold the State Defendants in contempt, including in the most recent proceedings over HB 2064. *See supra* 5-8, 16. With regard to the Rule 60(b) issue, the State raised long-standing concerns about the permissible use of federal funds when establishing a State system for funding ELL programs. (CR 415, 416.) All Defendants had requested that the district court address this important issue, recognizing that its resolution was necessary to protect the substantial federal funding provided to Arizona's schools. (CR 303; *see also* 380, 414, 415, 422 (requesting evaluation of HB 2064 as sufficient to comply with the judgment).)

The State and the Petitioners disagree, however, on the role of current state law in a Rule 60 analysis. Indeed, in *Rufo*, this Court made clear that modification of a decree under Rule 60(b) is not permitted if the modification itself would permit unlawful conduct. *Rufo*, 502 U.S. at 391 ("modification must not create or perpetuate a constitutional violation"); *see also Bd. of Educ. of Okla. City*, 498 U.S. at 250 (court should examine then-current student assignment plan in considering dissolution of injunction). And,

nothing in this Court's Rule 60 jurisprudence suggests that allegations of changed circumstances supporting relief from a judgment are to be examined without considering their entire context. In a case involving the adequacy of State educational programs, the context must necessarily include an analysis of the current state law governing those programs. Where, as here, current state law raises issues of possible violation of federal statutes, that law must be considered fully before a grant of relief under Rule 60 could be appropriate.

For that reason, the lower courts appropriately considered whether the two-year cap on most ELL funding violated the EEOA. (Int. Pet. App. 81a-86a, 114a-115a, 185a-186a.) In addition, they appropriately considered whether the setoffs based on federal education funding required by HB 2064 violated 20 U.S.C. § 7902's prohibition against considering federal funds and the anti-supplanting provisions of the ESEA. (*Id.* 86a-88a, 113a-114a, 181a-185a.)

II. Compliance with NCLB Is Not Equivalent to Compliance with the EEOA.

Both the NCLB and the EEOA address the instruction of ELLs, but they advance the instruction of those students through different means. NCLB conditions the receipt of federal monies on monitoring the aggregate progress of students and fulfilling self-imposed requirements for progress of those students. 20 U.S.C. § 6842(a)(3)(A) (requiring school to make

annual increases in the percentage of children progressing toward English proficiency). If progress is not made, the remedy is greater supervision, including the preparation of an improvement plan, technical help from the State, and the prospect of a State overhaul of curriculum or personnel if adequate progress is not made for four years in a row. 20 U.S.C. § 6842(b). In contrast, the EEOA requires assistance for all ELLs so that they can overcome language barriers. 20 U.S.C. § 1703(f). While NCLB monitors the gradual progress of some percentage of ELLs, the EEOA ensures "appropriate action" for all ELL students and provides a private right of action to enforce its mandate.

Congress did not amend EEOA when it enacted the NCLB, and nothing in the language of the NCLB suggests that Congress intended its provisions to define "appropriate action" under the EEOA. *See Morton v. Mancari*, 417 U.S. 535, 551 (1974) (where statutes can co-exist, each remains effective absent "clearly expressed congressional intention to the contrary"). To the contrary, the NCLB provides that "[n]othing in this part shall be construed in a manner inconsistent with any Federal law guaranteeing a civil right." 20 U.S.C. § 6847. The language of the two acts does not support Petitioners' contention that compliance with the procedural requirements of the NCLB now defines "appropriate action" under the EEOA.

Moreover, NCLB is a wholly voluntary program, consistent with the limited nature of Congress'

Spending Clause authority. *See, e.g.*, *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)) (Congress' authority to impose conditions in exchange for providing federal funding is conditioned on States' voluntary and knowing acceptance of those conditions). NCLB's extensive and specific requirements, set forth accurately and in considerable detail by the Petitioners, can be imposed only on those States and local school districts that choose to accept federal educational funding. *See* 20 U.S.C. § 7907(a) ("[n]othing in this Act shall be construed to authorize an officer or employee of the Federal Government to . . . mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act"). If compliance with NCLB's requirements for monitoring and incremental improvement of ELL instructional programs is construed as the new congressional benchmark for EEOA compliance, then the choice Congress provided to States in enacting NCLB will be rendered illusory. If every State will have to comply with Title III of NCLB in order to comply with the EEOA, then NCLB's mandate will apply to even those States that may choose to forego federal funding.

NCLB should not be so construed. The EEOA imposes only the limited requirement that each State choose and implement an educational program that assists ELLs in overcoming language barriers. 20 U.S.C. § 1703(f). As explained by the Fifth Circuit, that requirement means only that a State and school

district must take measures "reasonably calculated" to implement the chosen educational program and to achieve the desired outcome of student language acquisition to permit academic performance. *Castaneda v. Pickard*, 648 F.2d 989, 1009-10 (5th Cir. 1981) (setting forth a three-part standard for EEOA compliance that defers to the policy judgments of State and local officials). As the Petitioners correctly maintain, compliance with the EEOA does not require adoption of any particular program of either substantive education or state oversight (including that of the NLCB), nor does it require any particular method of implementing the chosen program.[11]

Petitioners' theory also invites additional private litigation against States regarding their efforts to comply with NCLB. The EEOA creates a private right of action for parties with standing to assert a State's failure to take "appropriate action." 20 U.S.C. § 1706. NLCB, in contrast, establishes no private right of action, providing instead for an exclusive federal and State administrative enforcement process. *See, e.g., Newark Parents Ass'n v. Newark Pub. Sch.*, 547 F.3d 199, 214 (3d Cir. 2008); *Alliance for Children, Inc. v. City of Detroit Pub. Sch.*, 475 F. Supp. 2d 655, 662-63 (E.D. Mich. 2007); *Ass'n of Cmty. Orgs. for Reform Now v. N.Y. City Dep't of Educ.*, 269 F. Supp. 2d 338,

---

[11] Of course, the data about student performance generated by NCLB and the programs put in place to meet its performance standards will certainly be relevant to EEOA litigation in any state that chooses to accept federal educational funding.

347 (S.D.N.Y. 2003). Using NCLB to determine whether a State complies with the EEOA undermines the distinct enforcement procedures that Congress established. Petitioners' theory would permit litigants to use the EEOA's private right of action to bring suits alleging that a State failed to take "appropriate action" because it did not comply with monitoring requirements established under NCLB or reach the NCLB's particular targets for student achievement in a given year. This scenario contravenes Congress's decision not to provide a private cause of action to enforce NCLB.

Under an appropriate reading of these two related, separate statutes, Arizona will remain free to accept or reject federal funding and the accompanying mandates of NCLB, as well as to implement the NCLB without fear of private suit to enforce any NCLB requirement. Under the EEOA, Arizona also retains the authority to change its chosen method and philosophy of ELL instruction or the way in which it funds that instruction, so long as the resulting program is reasonably likely to result in ELL students overcoming the language barriers they face.

CONCLUSION

Arizona's compliance with the EEOA must be judged by the law currently governing its instructional programs for ELL students and whether those programs are reasonably calculated to assist students in overcoming language barriers. When determining whether to grant Petitioners' motions for relief under Rule 60(b)(5), the lower courts correctly considered whether Arizona could deduct the amount of federal funds a school or school district may receive from the calculation of state assistance for ELL programs and whether a two-year limit on most ELL funding complies with the EEOA. It also correctly rejected the theory that the NCLB now defines "appropriate action" under the EEOA. For these reasons, the Ninth Circuit did not err in affirming the district court's decision to deny relief under Rule 60(b)(5) at this time.

Respectfully submitted,

TERRY GODDARD,
Attorney General
MARY O'GRADY,
Solicitor General
Susan P. Segal,
Assistant Attorney General
OFFICE OF THE ARIZONA
ATTORNEY GENERAL
1275 West Washington
Phoenix, Arizona 85007

ROBERT H. MCKIRGAN
LAWRENCE A. KASTEN
DAVID D. GARNER
KIMBERLY ANNE DEMARCHI
Counsel of Record
LEWIS AND ROCA LLP
40 North Central Avenue
Phoenix, Arizona 85004
(602) 262-5728

Counsel for Respondents State of Arizona and the Arizona State Board of Education

UNITED STATES
DEPARTMENT OF EDUCATION
OFFICE OF ELEMENTARY AND
SECONDARY EDUCATION
400 MARYLAND AVE. SW.,
WASHINGTON, DC 20202
www.ed.gov

[LOGO]

THE ASSISTANT SECRETARY

June 6, 2008

The Honorable Tom Horne
Superintendent of Public Instruction
Arizona Department of Education
1535 West Jefferson Street
Phoenix, Arizona 85007

Dear Superintendent Horne:

Over the past several months, we received a few inquiries concerning budget requests that the Arizona Department of Education (ADE) required its school districts to submit in February to implement Structured English Immersion (SEI) models required by Arizona State law (A.R.S. § 15-756.02A). We also learned that the Arizona legislature appropriated more than $40,000,000 to fund SEI models in the 2008-09 school year.

We understand that, under Arizona law (A.R.S. § 15-756.01(I)(1)-(3)), the allocation of State funds to a district to implement SEI models must be reduced by the amount of funds the district receives for its English language learner (ELL) population under the following four Elementary and Secondary Education

Act (ESEA) programs: Title I (improving the academic achievement of the disadvantaged), Title II-A (preparing, training, and recruiting high-quality teachers and principals), Title III (language instruction for limited English proficient and immigrant students), and Title VIII (Impact Aid program).

This letter is to remind Arizona that any requirement or plan to offset district allocations of State funds, based on the amount of Federal funds districts receive, would be inconsistent with several provisions of the ESEA.

First, section 9522 of the ESEA specifically prohibits a State from taking into consideration payments under any ESEA program (with the exception of Impact Aid) in determining the amount of State aid a school district can receive for the free public education of its children. As a result, ADE may not reduce the amount of State funds that a district would receive to implement SEI for ELL students under A.R.S. § 15-756.04(A) by the amount of funds that district receives, on the basis of its population of ELL students, under Titles I, II-A, and III of the ESEA.

Second, although Impact Aid is not covered by section 9522, the Impact Aid statute itself specifically prohibits a State, such as Arizona, that does not have in effect a program of State aid certified by the Secretary to equalize expenditures among school districts from considering Impact Aid payments in determining the amount of State aid to a school district for free public education. *See* 20 U.S.C. 7709(a)-(b).

Finally, Title I (20 U.S.C. 6321(b)), Title II-A (20 U.S.C. 6623(b)), and Title III (20 U.S.C. 6825(g)) of the ESEA contain supplement, not supplant provisions that prohibit the use of funds under each of those programs to supplant State funds that would have been made available in the absence of those Federal funds. Reducing the amount of State funds a district would receive to implement SEI models by the amount of funds a district received for its ELL population under its Title I, Title II, and Title III grants would violate the non-supplanting provisions of these programs because, in the absence of these Federal funds, the district would have received and expended more State funds to serve ELL students.

The Department would like to confirm that ADE intends to allocate State funds to implement SEI models without regard to the ESEA funds that districts in the State receive and in a manner that does snot violate the ESEA provisions outlined above. If you have any questions or wish to follow up by phone, please do not hesitate to contact Dr. Zollie Stevenson (202-260-1824) of my staff to set up an appointment for us to discuss this issue further.

Thank you for your attention to this matter.

Sincerely,

/s/ Kerri Briggs
Kerri L. Briggs, Ph.D.

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

RESPONDENT'S BRIEF

Nos. 08-289 and 08-294

IN THE

Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF ARIZONA,
Petitioner,

and

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES AND PRESIDENT OF THE ARIZONA SENATE,
Petitioners,

v.

MIRIAM FLORES, INDIVIDUALLY AND AS PARENT OF MIRIAM FLORES, MINOR CHILD; ROSA RZESLAWSKI, INDIVIDUALLY AND AS PARENT OF MARIO RZESLAWSKI, MINOR CHILD; STATE OF ARIZONA; AND MEMBERS OF THE ARIZONA STATE BOARD OF EDUCATION IN THEIR OFFICIAL CAPACITIES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS MIRIAM FLORES AND ROSA RZESLAWSKI

WALTER DELLINGER
HARVARD SUPREME COURT AND APPELLATE CLINIC
1575 Massachusetts Ave.
Cambridge, MA 02138

TIMOTHY M. HOGAN
JOY E. HERR-CARDILLO
ARIZONA CENTER FOR LAW IN THE PUBLIC INTEREST
202 E. McDowell Rd.
Phoenix, AZ 85004

SRI SRINIVASAN
(Counsel of Record)
IRVING L. GORNSTEIN
RYAN W. SCOTT
JUSTIN FLORENCE*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

**Admitted only in Massachusetts*

Attorneys for Respondents

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in concluding that no significant change in fact or law justified dissolving its orders requiring the State to determine the costs of an appropriate program for English Language Learner (ELL) students and to provide funding that was not arbitrary in relation to those costs.

2. Whether the court of appeals applied the correct standard in reviewing the district court's denial of petitioners' Rule 60(b)(5) motion.

3. Whether a state testing and accountability plan that is approved by the Secretary of Education as a condition for funding under the No Child Left Behind statute automatically satisfies the requirement under the Equal Educational Opportunities Act of 1974 (EEOA), 20 U.S.C. § 1703(f), to "take appropriate action" to overcome language barriers that impede participation in instructional programs.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

STATEMENT 1

A. Statutory Background 1

B. The 2000 Declaratory Judgment 4

C. The Court's Subsequent Orders 7

D. HB 2064, And The Rule 60(b) Motion 10

E. District Court Remand Decision 13

F. The Court Of Appeals' Decision 15

SUMMARY OF ARGUMENT 17

ARGUMENT 21

I. IT IS UNCLEAR WHETHER THE COURT OF APPEALS HAD JURISDICTION OVER THE APPEAL 21

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PETITIONERS' MOTION FOR COMPLETE DISSOLUTION OF THE ORDERS 23

A. The District Court's Orders Sought To Remedy A Systemic EEOA Violation And Appropriately Tracked The State's Preferred Method For Achieving EEOA Compliance 23

TABLE OF CONTENTS
(continued)

Page

B. Petitioners May Not Relitigate The Validity Of The Court's Orders But Must Establish That A Significant Change In Fact Or Law Justifies Their Complete Dissolution 30

C. The Flaws In HB 2064 Preclude Dissolution Of The Court's Orders 34

D. The Other Factual Changes Identified By Petitioners Fail To Compel Dissolution Of The Court's Orders 38

E. The Court Of Appeals Correctly Applied The Rule 60(b)(5) Standard 46

III. THE EEOA'S COMPLIANCE STANDARD HAS NOT BEEN DISPLACED OR QUALIFIED BY NCLB'S FUNDING CONDITIONS 48

A. The EEOA Requires A State To Implement Practices, Resources, And Personnel Necessary To Overcome Language Barriers 48

B. The Text Of NCLB Establishes That An Approved Plan Is Simply A Funding Condition 50

TABLE OF CONTENTS
(continued)

Page

C. Petitioners' Approach Would Replace The EEOA's Mandatory Duty And Private Right Of Action With A Voluntary Condition Enforceable Only By The Secretary 52

D. The Differences In The Scope Of The Two Statutes Confirm That NCLB Does Not Displace The EEOA 55

CONCLUSION 61

TABLE OF AUTHORITIES

Page(s)

CASES

Agostini v. Felton,
521 U.S. 203 (1997) 15

Alexander v. Gardner-Denver Co.,
415 U.S. 36 (1974) 58

Ariz. State Land Dep't v. McFate,
348 P.2d 912 (Ariz. 1960) 22

Barnes v. Gorman,
536 U.S. 181 (2002) 58

Bender v. Williamsport Area Sch. Dist.,
475 U.S. 534 (1986) 21

Castaneda v. Pickard,
648 F.2d 989 (5th Cir. 1981) ..... *passim*

CBOCS West, Inc. v. Humphries,
128 S. Ct. 1951 (2008) 58

Bd. of Educ. v. Dowell,
498 U.S. 237 (1991) 32, 34, 46

Fitzgerald v. Barnstable Sch. Comm.,
129 S. Ct. 788 (2009) ..... *passim*

Flores v. Arizona,
48 F. Supp. 2d 937 (D. Ariz. 1999) 4, 5

Frew ex rel. Frew v. Hawkins,
540 U.S. 431 (2004) 31, 33

Gomez v. Ill. State Bd. of Educ.,
811 F.2d 1030 (7th Cir. 1987) 2, 49

Hull v. Albrecht,
950 P.2d 1141 (Ariz. 1997) 26

Hutto v. Finney,
437 U.S. 678 (1978) 28

Johnson v. Ry. Express Agency, Inc.,
421 U.S. 454 (1975) 58

TABLE OF AUTHORITIES
(continued)

Page(s)

Jones v. Alfred H. Mayer Co.,
392 U.S. 409 (1968) 58

Karcher v. May,
484 U.S. 72 (1987) 21, 32

Lau v. Nichols,
414 U.S. 563 (1974) 1

Marek v. Chesny,
473 U.S. 1 (1985) 58

Miller v. Johnson,
515 U.S. 900 (1995) 33

Milliken v. Bradley,
433 U.S. 267 (1977) 24, 26

Missouri v. Jenkins,
515 U.S. 70 (1995) 18, 26, 29

Patterson v. McLean Credit Union,
491 U.S. 164 (1989) 55

Roosevelt Elem. Sch. Dist. v. Bishop,
877 P.2d 806 (Ariz. 1994) 26, 46

Rufo v. Inmates of Suffolk County Jail,
502 U.S. 367 (1992) ..... *passim*

State ex rel. Woods v. Block,
942 P.2d 428 (Ariz. 1997) 21, 22

System Fed'n v. Wright,
364 U.S. 642 (1961) ..... *passim*

Teresa P. v. Berkeley Unified Sch. Dist.,
724 F. Supp. 698 (N.D. Cal. 1989) 2

United States v. Fausto,
484 U.S. 439 (1988) 59

United States v. Swift & Co.,
286 U.S. 106 (1932) 46

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Texas,
680 F.2d 356 (5th Cir. 1982) 49

Will v. Mich. Dep't of State Police,
491 U.S. 58 (1989) 22

Wright v. Roanoke Redev. & Housing Auth.,
479 U.S. 418 (1987) 58

CONSTITUTIONAL PROVISIONS

Ariz. Const. art. XI, § 1 25

STATUTES

20 U.S.C. §§ 1234a-1234i 3
20 U.S.C. § 1703 ..... *passim*
20 U.S.C. § 1706 ..... 1, 53
20 U.S.C. § 1712 ..... 27, 33, 53
20 U.S.C. § 1713 27
20 U.S.C. § 1720 55
20 U.S.C. § 1758 27
20 U.S.C. § 6311 ..... *passim*
20 U.S.C. § 6314 36
20 U.S.C. § 6315 36
20 U.S.C. § 6316 57
20 U.S.C. § 6613 36
20 U.S.C. § 6801 53
20 U.S.C. § 6823 ..... *passim*
20 U.S.C. § 6825 ..... 3, 36, 57
20 U.S.C. § 6842 ..... 3, 57

TABLE OF AUTHORITIES
(continued)

Page(s)

20 U.S.C. § 6847 ..... 4, 52

20 U.S.C. § 7844 3

20 U.S.C. § 7902 36

A.R.S. § 15-251 22

A.R.S. § 15-752 39

A.R.S. § 15-756.01 36

Elementary and Secondary Education Act,
Pub. L. No. 89-10, 79 Stat. 27 (1965) 2

Equal Educational Opportunities Act of 1974,
Pub. L. No. 93-380, 88 Stat. 515 (1974) 1

No Child Left Behind Act,
Pub. L. No. 107-110, 115 Stat. 1425 (2002) 2, 3

RULES

Fed. R. Civ. P. 60(b)(5) ..... *passim*

REGULATIONS

34 C.F.R. § 200.20 56

34 C.F.R. § 200.6 56

45 C.F.R. § 80.3 1

TREATISES

11 Wright, Miller, & Kane, *Federal Practice & Procedure* (2d ed. 1995) 30, 31

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

ALEC Report Card (2008), *available at* http://www.alec.org/am/pdf/ReportCard08.pdf 45

Arizona Department of Education, School Report Cards, *available at* http://www10.ade.az.gov/reportcard 39, 41

Arizona ELL Task Force, Structured English Immersion Models (Apr. 10, 2008), *available at* http://azed.gov/ELLTaskForce/2008/SEIModels04-10-08.pdf 16, 43

Arizona Consolidated State Application Accountability Workbook (July 3, 2008), *available at* http://www.ed.gov/admins/lead/account/stateplans03/azcsa.pdf 59

Thomas C. Horne, 2009 State of Education Speech, *available at* http://www.ade.state.az.us/administration/superintendent/articles/2009StateofEducationSpeech.pdf 17

U.S. Dep't of Education, President Bush, Secretary Paige Celebrate Approval of Every State Accountability Plan Under No Child Left Behind (June 10, 2003), *available at* http://www.ed.gov/news/pressreleases/2003/ 3

TABLE OF AUTHORITIES
(continued)

Page(s)

U.S. Dep't of Education, Title VI Language Minority Compliance Procedures (issued Dec. 3, 1985; reissued Apr. 6, 1990), *available at* http://www.ed.gov/print/about/offices/list/ocr/docs/lau1990_and_1985.html 2

U.S. Dep't of Education, *Supplement Not Supplant Provision of Title III of the ESEA*, *available at* http://www.ed.gov/programs/sfgp/supplefinalattach1.doc 57

U.S. Dep't of Justice, Civil Rights Division, Discrimination Against English Language Learner Students, *available at* http://www.usdoj.gov/crt/edo/ellpage.php 2

U.S. Dep't of Justice, Educational Opportunities Section Cases on English Language Learners, *available at* http://www.usdoj.gov/crt/edo/caselist.php 51

U.S. Dep't of Labor, Bureau of Labor Statistics, CPI Inflation Calculator, *available at* http://www.bls.gov/data/inflation_calculator.htm 44

STATEMENT

A. Statutory Background

1. The Equal Educational Opportunities Act of 1974 (EEOA), Pub. L. No. 93-380, title II, 88 Stat. 515 (1974), provides that "[n]o State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin" by "the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. § 1703(f). The EEOA provides individuals with an express private right of action and authorizes courts to grant "such relief, as may be appropriate" for failures to take appropriate action. *See id.* § 1706. The EEOA parallels a regulation issued under Title VI of the Civil Rights Act of 1964 that requires states to take affirmative steps to overcome the language barriers faced by English Language Learner (ELL) students so that they may enjoy equal educational opportunity. *See* 45 C.F.R. § 80.3(b)(1). This Court upheld the validity of that regulation in *Lau v. Nichols*, 414 U.S. 563 (1974).

The leading case interpreting the EEOA's "appropriate action" requirement for ELL programs is *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981). The Fifth Circuit held that "appropriate action" consists of three elements. First, the school system must select a sound educational theory. *Id.* at 1009. Second, it must "follow through with practices, resources and personnel necessary to transform the theory into reality." *Id.* at 1010. Third, the programs must "produce results indicating that the language barriers confronting students are actually be-

ing overcome." *Id.* The *Castaneda* framework has been universally embraced by federal courts that have construed the EEOA and by the federal agencies responsible for enforcing the EEOA and Title VI.[1]

2. The EEOA and Title VI have long existed alongside statutes providing federal funding to states for ELL programs. Since 1965, the Elementary and Secondary Education Act (ESEA), Pub. L. No. 89-10, 79 Stat. 27 (1965), has provided funding for programs aimed at low-income students. In 1978, Congress amended the ESEA by adding Title VII, the Bilingual Education Act, Pub. L. No. 95-561, 92 Stat. 2143 (1978), which provides federal grants for ELL programs.

In 2002, Congress enacted the No Child Left Behind Act (NCLB), Pub. L. No. 107-110, 115 Stat. 1425, 1980 (2002), as an amendment to the ESEA. Title I continues to provide funds for disadvantaged students and high-poverty schools and contains conditions related to educational testing for all students. Title III replaced the Bilingual Education Act and

---

[1] *See, e.g.*, *Gomez v. Ill. State Bd. of Educ.*, 811 F.2d 1030, 1041-42 (7th Cir. 1987); *Teresa P. v. Berkeley Unified Sch. Dist.*, 724 F. Supp. 698, 713 (N.D. Cal. 1989); U.S. Dep't of Justice, Civil Rights Division, Discrimination Against English Language Learner Students, *available at* http://www.usdoj.gov/crt/edo/ellpage.php (school's failure "to provide resources to implement its language acquisition program effectively" may violate EEOA); U.S. Dep't of Education, Title VI Language Minority Compliance Procedures (issued Dec. 3, 1985; reissued Apr. 6, 1990), *available at* http://www.ed.gov/print/about/offices/list/ocr/docs/lau1990_and_1985.html (adopting *Castaneda* framework).

significantly revised and expanded federal grant programs for ELL students. *Id.* §§ 301, 1011. No state is obligated to accept federal funds under NCLB. *See, e.g.*, 20 U.S.C. § 6311(a)(1). Once a state voluntarily accepts funds, however, it becomes subject to NCLB's conditions. *See, e.g.*, *id.* § 7844. Title III also contains a "supplement, not supplant" provision barring use of federal funds to supplant other funds that would have been expended on ELL programs. *Id.* § 6825(g). Violation of the "supplement, not supplant" requirement exposes a state to the loss of all federal education funds. *See id.* §§ 1234a-1234i.

To receive federal funds under Title III of NCLB, a state must submit a plan to the U.S. Department of Education outlining how it will set achievement standards and hold local districts accountable for fulfilling them. 20 U.S.C. § 6823(b). Title III requires participating states to test whether ELL students at different grade levels make adequate yearly progress (AYP) in achievement tests, *id.* § 6311(b), and to take corrective measures with respect to schools that fail to make AYP, such as withdrawal of funds or replacing staff, *id.* § 6842(b). The Department of Education has approved the plans of all 50 states and the District of Columbia. *See* U.S. Dep't of Education, President Bush, Secretary Paige Celebrate Approval of Every State Accountability Plan Under No Child Left Behind (June 10, 2003), *available at* http://www.ed.gov/news/pressreleases/2003/.

NCLB did not amend or replace the EEOA. Instead, Congress enacted a savings clause prescribing that "[n]othing in [NCLB] shall be construed in a

manner inconsistent with any federal law guaranteeing a civil right." 20 U.S.C. § 6847.

B. The 2000 Declaratory Judgment

1. In 1992, parents and students at Nogales Unified School District (respondents), a district in southwestern Arizona along the Mexican border, brought this action against the State of Arizona, members of the state board of education, and the state superintendent of public instruction (the Superintendent), alleging violations of the EEOA. J.A. 1-18. Respondents alleged that "Defendants have allowed a number of districts, including [Nogales], to forego or substantially neglect identification, testing, placement, instruction, assessment and reclassification of [ELL] students as federal law requires." *Id.* at 7. They also alleged that "[t]he State has failed to provide financial and other resources necessary for adequate implementation of mandatory [ELL] programs by public school districts in Arizona." *Id.* The district court certified respondents as representatives of a class of present and future "minority 'at risk' and limited English proficient children" in Nogales, as well as their parents and guardians. Pet. App. 7a.[2]

The district court ultimately set several claims for trial. *Flores v. Arizona*, 48 F. Supp. 2d 937, 955 (D. Ariz. 1999). The court stated that its approach would leave state officials free to select ELL instructional programs of their choice, and that it would assess "whether the State's financing scheme is arbi-

---

[2] "Pet. App." refers to the appendix to the petition for certiorari in No. 08-294.

trary and bears no relation to actual need." *Id.* at 947. The court emphasized that "federal courts are ill-equipped" to evaluate what specific actions are appropriate, and that it would avoid "substituting its educational values and theories for the educational polices and decisions reserved to state or local school authorities." *Id.* at 948-49. A Consent Order agreed to by the parties before trial (but entered after judgment) resolved certain issues, J.A. 19-40, but did not address funding, number of qualified teachers, class sizes, tutors, teacher aides, instructional materials, or other ELL program attributes.

2. In January 2000, the district court held that the defendants had violated the EEOA and granted respondents a declaratory judgment. Pet. App. 10a. The court concluded that the State satisfied the first prong of *Castaneda* by adopting ELL instructional methods "generally regarded by experts as sound." *Id.* at 148a. It determined, however, that the State had failed to satisfy the second *Castaneda* prong because it did not "follow through" with sufficient "practices, resources, and personnel" to implement its chosen instructional methods. *Id.* at 151a.

The court made a series of findings concerning Arizona's education funding system. The court explained that Arizona "guarantees a minimum level of funding for each student to ensure that each student receives a basic education." Pet. App. 122a. That per-student base funding amount was approximately $3,174.11. *Id.* The State adjusts that funding level for particular classes of students, like ELL students, using a system of incremental "Group B weights." *Id.* at 123a. At the time, the incremental Group B

weight for each ELL student was approximately $150. *Id.* at 125a. The court observed that, although the State provided an additional $150 per ELL student, a cost study performed in 1987-88 showed that districts actually spent $450 per ELL student, and even that study underestimated the costs of an effective program. *Id.* at 123a-124a. Districts like Nogales therefore had no choice but to "increase [ELL] funding by shifting money from non-[ELL] student apportionments." *Id.* at 129a.

The combination of Group B funding and shifting from base funding had proven insufficient to operate an appropriate ELL program. The court found that the State's "inadequate" funding scheme had "resulted in the following [ELL] program deficiencies: 1) too many students in a class room, 2) not enough class rooms, 3) not enough qualified teachers, including teachers to teach ESL and bilingual teachers to teach content area studies, 4) not enough teacher aids, 5) an inadequate tutoring program, and 6) insufficient teaching materials for both ESL classes and content area courses." Pet. App. 149a-150a. The resource constraints were most acute at the middle and high school levels. *Id.* at 133a-138a.

The court found a violation of the EEOA because the State had "failed to follow through with [adequate] practices, resources, and personnel" to implement ELL programs, and because the State's ELL funding was "arbitrary and capricious and bears no relation to the actual funding needed to ensure that [ELL] students in [Nogales] are achieving mastery of its specified 'essential skills.'" Pet. App. 150a-151a. In that regard, the State had advised the court that

it had "taken the first necessary steps" because the "Legislature has ordered the formation of a committee" to study "which bilingual programs work and which do not" and "the amount of money that *needs* to be spent on bilingual programs." Defendants' Trial Mem. (Dkt. #189), at 5 (filed Sept. 17, 1999). The State urged the court to avoid interfering with that process because "the people of the state" had "begun the first steps to address the very issue before [the] Court." *Id.* at 5-6. The court accordingly noted that the State had "ordered another cost study" to "determine the best practices" for ELL programs and "the cost of educating [ELL] students versus what is currently being spent." Pet. App. 125a. The court observed that the study "might well provide a basis for the State to set" ELL funding "which would not be arbitrary and capricious." *Id.* at 150a.

The State did not appeal the district court's judgment. Pet. App. 15a.

C. The Court's Subsequent Orders

1. The State took no action during the 2000 legislative session, and respondents asked the district court to order the defendants to complete a cost study as an initial step toward compliance with the EEOA. Motion for Post-Judgment Relief (Dkt. #203), at 1 (July 13, 2000). The State filed a response "agree[ing] that the actual costs of providing an appropriate, state-wide system of English Acquisition Programs must be ascertained," but requesting additional time to complete the study. Defendants' Resp. (Dkt. #207), at 1, 6 (Aug. 18, 2000).

In October 2000, the district court ordered the State to conduct a cost study "because without judi-

cial action, the federal law violations" would "continue." J.A. 39. The court reiterated that it would "take[] every step to allow state authorities, whose powers are plenary, to decide how to provide [ELL] students with a meaningful [ELL] program." *Id.* The State again did not appeal from that judgment.

2. In November 2000, two ballot initiatives passed by voters had the effect of increasing funding for certain education programs but not ELL programs (Proposition 301), and adopting "sheltered English immersion" as the statewide method for ELL education (Proposition 203). Pet. App. 16a. The State nonetheless took no action to adjust ELL funding during the 2001 legislative session. Respondents therefore moved the district court to compel the State to comply with its declaratory judgment by a specific date. J.A. 42.

In June 2001, the court granted respondents' motion. Emphasizing the "backdrop of state inaction" beginning in 1992 and "continuing through the duration of this case," J.A. 41, the court ordered that "the State's minimum base level of funding per [ELL] student shall not be arbitrary and capricious, but shall bear a rational relationship to the actual funding needed to implement language acquisition programs in Arizona's schools so that [ELL] students may achieve mastery of the State's specified 'essential skills,'" *id.* at 44-45. Once again, the State did not appeal.

3. In December 2001, Arizona enacted HB 2010, which increased the Group B weight from $179 to $340 per ELL student. J.A. 48. HB 2010 also established certain statewide funds for teacher training,

compensatory instruction, and monitoring, and ordered a more detailed cost study. *Id.*

In 2002, the district court concluded that HB 2010 failed to satisfy its judgment because it "fails to have any rational relationship to the actual cost of implementing a language acquisition program." J.A. 49. The court found that the State "has never set specific standards for its programs, nor identified the requisite elements, features, or components for such programs and, therefore, has never assessed actual costs for language acquisition programs." *Id.* The court also found the Group B weight grossly inadequate because it matched the amount Nogales actually spent on programs, and those programs were seriously deficient. *Id.*

The State moved for reconsideration, and the court granted the motion, concluding that HB 2010 was appropriate as an "interim" measure. J.A. 54. The court relied on the State's representation that it was moving ahead with the HB 2010 cost study and was not asking the court "to terminate this litigation." *Id.*

4. For more than two years, the State still took no further action to attain compliance with the district court's orders, Pet. App. 18a-19a, and respondents filed another motion for injunctive relief. In January 2005, the court granted respondents' motion. J.A. 386-93. The court noted the cost study contemplated by HB 2010 still had not been completed. *Id.* at 389. In order "to ensure that Plaintiffs receive the relief they were found to be entitled to more than five years ago while not putting any more requirements on the State than is absolutely neces-

sary," *id.*, the court ordered the defendants to comply with its declaratory judgment "by appropriately and constitutionally funding the state's ELL programs" by the end of the 2005 legislative session. *Id.* at 393. The State again did not appeal.

In December 2005, the district court granted a motion to impose sanctions against the defendants to compel compliance. Pet. App. 173a-174a. The court noted that, as a result of the State's "egregious delay," *id.* at 167a, "[t]housands of children . . . have now been impacted by the State's continued inadequate funding of ELL programs," *id.* at 156a.

D. HB 2064, And The Rule 60(b) Motion

1. In March 2006, Arizona HB 2064 became law without the signature of the governor. Pet. App. 20a-21a; *id.* at 268a-334a. HB 2064 embodies the legislature's selected approach to designing and funding ELL programs and complying with the EEOA. The legislature accordingly explained in HB 2064 that it "intends to enact a comprehensive, efficient and cost-effective program of developing research based models of structured English immersion that comply with all state and federal laws" and of "funding the incremental costs of [those] research based models." *Id.* at 332a.

HB 2064 states the "legislature['s] belie[f]" that "the amount of monies spent on English language learners" is "important," as is "the way the monies will be spent." Pet. App. 333a. The law increased the Group B weight for ELL students from $340 to $450 per student, but expressly conditioned that increase on the district court's determination that HB

2064 constitutes "appropriate action to establish a program that addresses the orders in [this] case." *Id.* at 333a-334a. HB 2064 also established a statewide "structured English immersion fund" ("SEI Fund"). Districts whose incremental ELL costs exceed their Group B weight funds may apply to the SEI Fund to cover those excess costs. *Id.* at 22a, 284a-286a. In addition, HB 2064 created a task force to "develop and adopt research based models of structured English immersion programs." *Id.* at 282a. The task force was charged with establishing procedures for school districts to determine the "incremental costs" of the approved ELL models they select. *Id.* at 284a. HB 2064 declares that the costs of implementing the new [ELL] programs cannot be determined until" the "task force develops the research based models." *Id.* at 332a.

HB 2064 also contains two significant restrictions. First, it cuts off Group B weight funding for any ELL student after two years regardless of continuing need for ELL services. The SEI Fund likewise provides no funding for any ELL student after two years. Pet. App. 22a, 286a. And although HB 2064 creates a statewide compensatory instruction fund potentially covering students who remain ELL-classified after two years, funding is highly limited, *id.* at 108a (total of $74 per ELL student), and can be used only for programs outside ordinary school hours rather than for normal classroom instruction, *id.* at 304a-306a. Second, when seeking SEI funding to cover ELL program costs in excess of Group B weight funding, a school district must first deduct from its SEI request the amount of all federal funds received under Title III of NCLB, certain federal

funds received under Titles I and II of NCLB, and desegregation funds received under Arizona law. *Id.* at 23a-24a.

2. In March 2006, the Speaker of the Arizona House of Representatives and President of the Arizona Senate ("the legislator-intervenors") filed a motion to intervene to defend HB 2064 and "otherwise to defend the interests of the Legislature." J.A. 56. The district court denied intervention of right but granted permissive intervention. Pet. App. 175a.

Subsequently, the legislator-intervenors, ultimately joined by the Superintendent, moved under Rule 60(b)(5) to purge the sanctions order and to dissolve the court's 2005 and 2001 injunctions and the initial 2000 declaratory judgment. Motion to Purge and Dissolve (Dkt. #422) (filed Mar. 24, 2006). They argued that HB 2064 had satisfied the court's orders and the EEOA's "appropriate action" requirement, and also that significant changes in fact and law justified dissolving the orders. The State opposed the motion on the ground that HB 2064 failed to provide funding rationally related to the costs of an appropriate ELL program. Br. of State (Dkt. #415), at 3 (filed Mar. 24, 2006). It later observed that "until recently there [had been] consensus that compliance required a determination of the actual costs of implementing Arizona's chosen ELL programs and payment of those costs." State's Evidentiary Hearing Br. (Dkt. #592), at 3 (filed Jan. 4, 2007).

In April 2006, the district court concluded that HB 2064 "fails to satisfy" its 2000 order or "comply with Federal Law," Pet. App. 187a, because it has no "rational relationship to the cost of providing an ELL

program" and "has added new hurdles to the mix," *id.* at 179a. The court specifically found that the SEI Fund offset for federal funds violates NCLB's "supplement, not supplant" provisions, Pet. App. 181a-185a, and that the cutoff of Group B and SEI funds after two years is arbitrary. *Id.* at 185a-186a.

Petitioners appealed from that order as well as the previously entered sanctions order. The court of appeals vacated the orders and remanded for an evidentiary hearing. Pet. App. 190a.

E. District Court Remand Decision

On remand, the district court held an eight-day evidentiary hearing. Pet. App. 98a. In March 2007, the district court denied petitioners' motion under Rule 60(b)(5). *Id.* at 96a-116a.

Applying the standard set forth in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), the court found no "changed circumstances that would warrant modification or dissolution of this Court's order." Pet. App. 111a-112a, 116a. The court recognized that there had been improvements in Nogales. *Id.* at 99a-100a. It found, however, that "[s]uccess" at the high school level "was not being achieved," and that improvements throughout the system were "fleeting at best." *Id.* at 100a. That was particularly true because the State had yet to establish "clear rules and requirements that can be fulfilled and followed," or a funding system that rationally related funding to an appropriate program. *Id.* at 100a, 115a.

Evidence at trial supported the court's findings. For instance, despite the expectation under HB 2064

that ELL students would become English proficient within two years, Nogales ELL students required an average of four to five years to be reclassified. Pet. App. 108a. And only 59% of Arizona ELL students ever graduate, which petitioners' own witness described as unacceptable. J.A. 195.

Although changes in testing made any analysis of test results difficult, Pet. App. 33a, the available data confirmed that serious problems remained, particularly at the high school level. For instance, Nogales's ELL tenth graders substantially underperformed both Nogales's ELL third graders and ELL tenth graders statewide. *Id.* at 38a-39a. And Nogales's high schools ranked "at the bottom of the heap" for ELL performance statewide, *id.* at 40a, which petitioners' witnesses considered unacceptable, J.A. 193-195.

While there were improvements in teacher qualifications and class size, serious programmatic deficiencies remained, and those deficiencies reflected resource constraints. Nogales lacked sufficient funds to compete for the most qualified teachers. It therefore relied on long-term substitutes rather than permanent teachers, and on teachers who obtained only emergency certification. Pet. App. 36a; Tr. Day 6, at 48-49. Nogales also could not pay for the teacher aides or tutors who were considered essential to an effective program. J.A. 322-337.

In addition, average class sizes remained high. The State's monitoring report revealed that one Nogales middle school had an average 31 students per class. J.A. 331. No schools approached the teacher-student ratio identified by the Arizona Department

of Education as its only research-based model for ELL instruction. Tr. Day 3, at 95-100.

State funding for ELL programs also bore no relation to the costs of an appropriate program. In fact, petitioners made no effort to establish the incremental costs of an appropriate program of ELL instruction. The evidence showed that in 2005-06, Nogales expended $1,570.42 per ELL student for a program that was still seriously deficient. Pet. App. 41a. That expenditure was "over three times the Group B level weight funding Arizona provides for ELL programs under either HB 2010 or HB 2064." *Id.* Moreover, because of its two-year cut-off, HB 2064 would effectively reduce group B weight funding from $365 per student to $182 per student. *Id.* at 107a. And HB 2064's reliance on federal funding in violation of the federal "supplement, not supplant" provisions added to its inadequacy. *Id.* at 113a-114a. Finally, while there were modest increases in state base-level funding, those funds could be used for ELL programs only by cutting into the general programs. Pet. App. 42a-43a.

F. The Court Of Appeals' Decision

Petitioners appealed from the denial of their Rule 60(b) motion, and the court of appeals affirmed. Pet. App. 1a-91a. Relying on *Rufo* and *Agostini v. Felton*, 521 U.S. 203, 215 (1997), the court noted that Rule 60(b)(5) relief is warranted when a party seeking relief shows "a significant change either in factual conditions or in law." Pet. App. 49a (citations and internal quotation marks omitted). The court understood that this is a "general, flexible standard," *id.* at 49a, but explained that Rule 60(b) "may not be used

to remedy a failure to contest in the first instance the legal rulings underlying the judgment itself," *id.* at 51a. The court therefore declined to revisit the legal determinations underlying the initial judgment and subsequent injunctions. *Id.* at 50a-51a.

Applying those principles, the court concluded that the district court did not abuse its discretion in denying the Rule 60(b)(5) motion. Based on the record, the court of appeals found that resource constraints had resulted in "persistent achievement gaps" between ELL students and other students in Nogales. Pet. App. 66a. And it also determined that resource constraints caused ongoing, serious programmatic deficiencies in teachers, tutors, teacher aides, and class size. *Id.* The court therefore concluded that the record did not "call into serious question [Nogales's] need for increased incremental funds." *Id.* at 64a-65a.

With respect to HB 2064, the court of appeals agreed that the "two-year funding cut-off alone renders the law inadequate as a funding scheme rationally grounded in the costs of providing ELL programs." Pet. App. 84a. It also concluded that HB 2064 violated federal "supplement, not supplant" provisions, seriously jeopardizing Arizona's federal education funds. *Id.* at 86a. Finally, the court rejected petitioners' contention "that state compliance with NCLB benchmarks should be enough to satisfy the EEOA, and hence the judgment." *Id.* at 72a-80a.[3]

---

[3] While the case was pending in the court of appeals, the task force completed a set of instructional models. *See* Arizona

SUMMARY OF ARGUMENT

The district court held in 2000 that Arizona had systematically violated the EEOA through an "arbitrary and capricious" funding system that bore no rational relation to the resources needed for appropriate ELL programs. As a result of that arbitrary funding system, programs for ELL students in Nogales suffered from serious deficiencies, including excessive class sizes, a shortage of qualified teachers and teacher aides, and inadequate teaching materials and tutoring programs. The court imposed a remedy directly related to that violation, ordering that the State identify the elements of an effective ELL program, determine the costs of such a program, and then ensure funding rationally related to

---

ELL Task Force, Structured English Immersion Models (Apr. 10, 2008), *available at* http://azed.gov/ELLTaskForce/2008/SEIModels04-10-08.pdf. In April 2008, the State enacted SB 1096, which made the first appropriation to the SEI Find for fiscal year 2008-09. Notice of Appropriation (Dkt # 726), at 1 (filed Apr. 11, 2008). The court set an evidentiary hearing to resolve, among other issues, "whether the newly-developed task force models "are rationally funded," and whether "the January 24, 2000 judgment has been satisfied." Order of July 24, 2008 (Dkt. #770), at 1. The hearing was conducted in November 2008, but the court had not yet ruled at the time this Court granted the petitions for writs of certiorari. Pursuant to the parties' stipulation, the district court has stayed all proceedings until this Court's decision. Order of Jan. 16, 2009 (Dkt. #860). On February 12, 2009, the Superintendent announced that he was cutting this year's SEI Fund appropriation request by almost 75%, from $40.6 million to $8.8 million. Thomas C. Horne, 2009 State of Education Speech 13, *at* http://www.ade.state.az.us/administration/superintendent/articles/2009StateofEducationSpeech.pdf.

those program costs. The court's approach accorded with the State's own representations that it was already conducting a study to identify appropriate ELL programs and determine their costs, and also with the State's chosen policy for coming into compliance with the EEOA.

The district court never directed the State to implement any particular ELL programs, instead leaving identification of the attributes of appropriate ELL programs entirely to state officials. The court also never directed the State to adopt a particular method for determining the costs of an appropriate ELL program, instead leaving it to the State to assess program costs. And the court never ordered the State to adopt any particular funding model for ELL programs or to spend any particular amount of money on ELL programs, instead ordering only that the State ensure that funding—whatever the method or source—bear a non-arbitrary relationship to the actual costs (calculated by the State itself) of an appropriate ELL program (devised by the State itself). The district court's remedial approach is fully consistent with this Court's remedial standards. *See Missouri v. Jenkins*, 515 U.S. 70, 88 (1995).

Rule 60(b)(5) does not permit petitioners now to revisit the basic legal premises of the court's earlier orders. Instead, petitioners bear the burden of showing a "significant change" in facts or law such that continued injunctive relief is no longer equitable. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 393 (1992). Because petitioners sought complete dissolution of the court's remedial orders, they were required to show that the significant factual changes

on which they relied would enable full compliance with the EEOA and would remain durable over time, thus justifying an end to all judicial supervision despite the systematic violations of the EEOA that prompted the original order.

The district court acted within its discretion in finding that petitioners failed to make that showing. To begin with, Arizona's operative law governing ELL programs and funding, HB 2064, offers no assurance that the State is taking appropriate action to overcome language barriers in Nogales or elsewhere. In two important ways, HB 2064 in fact marks a step backward. First, HB 2064 cuts off almost all funding for ELL students after two years, despite overwhelming evidence that attaining English proficiency frequently takes substantially longer. In Nogales, HB 2064 has the effect of drastically reducing funds for ELL programs, returning state support to the same levels that resulted in the grave deficiencies identified by the court in 2000. Second, HB 2064 directly contravenes federal "supplement, not supplant" provisions by requiring school districts to offset federal monies from their requests for state ELL program funding. Petitioners therefore cannot demonstrate fulfillment of the court's orders based on HB 2064.

While petitioners point to changed factual circumstances apart from HB 2064, they cannot avoid the central salience of the State's governing method for delivering and funding ELL programs when assessing whether the district court was required to grant them complete relief. In any event, even aside from HB 2064, the district court did not abuse its

discretion in concluding that circumstances in Nogales failed to warrant complete dissolution of its remedial orders. The court found continuing deficiencies in Nogales's ELL programs at the high school level, and also concluded that the district's successes at all levels had not been shown to be durable. Those findings are supported by the record, and the court acted within its discretion in declining to dissolve its orders in the absence of sound evidence of material and durable change.

Petitioners fare no better in contending that, after NCLB's enactment, a state's mere possession of an approved NCLB plan automatically satisfies its EEOA obligation to take appropriate action to overcome language barriers. Nothing in the terms or context of either statute supports that conclusion. Had Congress intended for approval of an NCLB plan to establish compliance with the EEOA, Congress would have said so explicitly, particularly given that the Secretary's approval of an NCLB plan involves no substantive review of the adequacy of the State's ELL programs. And whereas the EEOA imposes mandatory duties on all states and provides for private actions resulting in judicial remedies, NCLB involves duties voluntarily assumed by states and provides for enforcement by administrative action alone. NCLB also is narrower in substantive scope than the EEOA in several respects and broader in others, confirming that NCLB supplemented rather than displaced the EEOA. In short, there is no basis for inferring an implicit intention by Congress that a state's possession of an approved NCLB plan—which every state now possesses—

would somehow automatically establish compliance with the EEOA.

ARGUMENT

I. IT IS UNCLEAR WHETHER THE COURT OF APPEALS HAD JURISDICTION OVER THE APPEAL

This Court "has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). It appears that the legislator-intervenors lacked authority to appeal the district court's order, and it is unclear whether the Superintendent possessed authority. If neither had authority to appeal, the court of appeals lacked jurisdiction over the appeal.

With respect to the Speaker of the House and President of the Senate, they sought to appeal as representatives of the state legislature. Such representatives possess standing to appeal in federal court only when state law authorizes the legislature to represent the State's interests in litigation. *See Karcher v. May*, 484 U.S. 72, 82 (1987). The Arizona Supreme Court has held that the Arizona Constitution precludes the state legislature from representing the state's interests in litigation, because litigating is an executive function and the Arizona Constitution bars the legislature from exercising an executive function. *State ex rel. Woods v. Block*, 942 P.2d 428, 434-37 (Ariz. 1997). The legislature thus may not intrude on the executive's constitutional authority based simply on dissatisfaction with the execu-

tive's litigation judgments. *Id.* at 429-31. It therefore appears that the legislator-intervenors may have lacked standing to appeal.

With respect to the Superintendent, he was a named defendant and the judgment and injunctions run against all defendants. But because the Superintendent was sued in his official capacity, the State is the real party in interest, *see Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989), and the State decided not to appeal. HB 2064 authorized the Superintendent to hire outside counsel for this litigation, Pet. App. 330a, but does not by terms authorize the Superintendent to represent the State's interest by appealing when the State is a named party and declines to appeal. Nor does the legislation purport to give to the Superintendent policymaking authority over matters covered by the judgment. That policymaking authority instead remains with the State Board of Education, A.R.S. § 15-251(3), (5), which made a policy decision not to appeal. It may be that, under the Arizona Constitution, only the Governor could have resolved the conflict within the Executive Branch by directing an appeal. *See Ariz. State Land Dep't v. McFate*, 348 P.2d 912, 918 (1960). It is therefore unclear whether the Superintendent had standing to appeal.

The question of authority to appeal is particularly important because the State and State Board of Education not only declined to appeal; they also defended the district court's denial of petitioners' Rule 60(b) motion. The court of appeals was therefore "in the uncomfortable position of mediating between state officials with regard to the execution of an obli-

gation of the state as a whole." Pet. App. 55a. That uncomfortable position would not exist if petitioners lacked authority to appeal. If this Court determines that neither the legislator-intervenors nor the Superintendent had authority, it should vacate the Ninth Circuit's decision and direct that it dismiss the appeals.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PETITIONERS' MOTION FOR COMPLETE DISSOLUTION OF THE ORDERS

A. The District Court's Orders Sought To Remedy A Systemic EEOA Violation And Appropriately Tracked The State's Preferred Method For Achieving EEOA Compliance

1. a. The Equal Educational Opportunities Act of 1974 (EEOA) provides that "[n]o State shall deny equal education opportunity to an individual" by "the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. § 1703. In 2000, the district court determined that the State of Arizona had systematically violated that statutory prohibition. First, the court found that state funding for ELL programs was "arbitrary and capricious" and bore no relationship to the actual funding needed to ensure that students learn essential skills. Pet. App. 150a. And second, it found that the State's inadequate funding system produced serious deficiencies in the ELL program at Nogales, including excessive

class sizes, insufficient qualified teachers and teacher aides, and inadequate tutoring programs and teaching materials. *Id.* at 149a-150a.

Based on those findings, the court concluded that "Defendants are violating the EEOA because the State's arbitrary and capricious [ELL] appropriation is not reasonably calculated to effectively implement the [ELL] theory which it approved." *Id.* at 150a. The court further concluded that "Defendants are violating the EEOA because . . . despite the adoption of a recognized [ELL] program in [Nogales], the State has failed to follow through with practices, resources and personnel necessary to transform theory into reality." *Id.* at 151a.

To remedy the systemic EEOA violation, the district court refrained from directing implementation of any particular programs or dedication of any specific funding amounts. *Compare Milliken v. Bradley*, 433 U.S. 267, 288-89 (1977) (directing the State to pay one-half the costs of four specific remedial education programs). Instead, the court's approach, from the outset, allowed the State to determine both the elements of an appropriate ELL program and the program costs. The sole constraint imposed on the State was that funding bear a rational relationship to the costs the State itself determined necessary to implement the programs the State itself devised. Pet. App. 150a; J.A. 44, 393.

b. The district court's remedial approach accorded with the State's own desire to fulfill its responsibilities under the EEOA by completing an ongoing study of appropriate ELL programs and their costs. Pet. App. 150a. The State informed the court

before the 2000 declaratory judgment that a legislative committee had been formed to conduct "a detailed analysis of which bilingual programs work and which do not, as well as the amount of money that is currently being spent and the amount of money that *needs* to be spent on bilingual programs." Defendants' Trial Mem. (Dkt. #189), at 5 (filed Sept. 17, 1999). After the judgment, the State reiterated that "Defendants agree that the actual costs of providing an appropriate, state-wide system of English Acquisition Programs must be ascertained." Defendants' Resp. (Dkt. #207), at 1 (filed Aug. 18, 2000).

The court's remedial approach also built upon the State's policy decision, manifested in its statutory scheme, to provide local school districts with incremental funding for ELL programs. Pet. App. 149a. The Legislature renewed its commitment to that approach in HB 2064, stating that the State intends to develop "research based models of structured English immersion that comply with all state and federal laws" and to "fund[] the incremental costs of the research based models that are in addition to the normal costs of conducting programs for English proficient students." *Id.* at 332a. As the State observed in 2007, "until recently there was consensus that compliance required a determination of the actual costs of implementing Arizona's chosen ELL programs and payment of those costs." State's Evidentiary Hearing Br. (Dkt. #592), at 3 (filed Jan. 4, 2007). Also, the court's remedial orders were modeled on the approach adopted by the Arizona Supreme Court in implementing the Arizona Constitution's guarantee of a "general and uniform public school system," Ariz. Const. art. XI, § 1. Pet. App.

148a, 150a; *see Roosevelt Elem. Sch. Dist. v. Bishop*, 877 P.2d 806 (Ariz. 1994). The Arizona Supreme Court has held that, to satisfy that requirement, the State must establish minimum standards and, "[o]nce a standard is set, the legislature must choose a funding mechanism that does not cause substantial disparities and that ensures that no school in Arizona falls below the standard." *Hull v. Albrecht*, 950 P.2d 1141, 1145 (Ariz. 1997).

c. The district court's approach also accorded with remedial standards established by this Court: that a remedy (i) "relate[] to" the violation; (ii) be designed "to restore the victims of [the unlawful] conduct to the position they would have occupied in the absence of such conduct"; and (iii) "take into account the interests of state and local authorities in managing their own affairs." *Milliken*, 433 U.S. at 280-81; *Missouri v. Jenkins*, 515 U.S. 70, 87-88 (1995). First, as the district court found, appropriate EEOA programs cost money, and the State's failure to ensure funding rationally related to the costs the State itself found necessary for ELL programs had caused the widespread deficiencies in the Nogales program. The district court's remedy directly related to that violation. Second, the court's remedy aimed to assure that the student victims of the State's violation were afforded the learning opportunities they had been unlawfully denied. And third, because the remedy was based on the State's preferred method for complying with the EEOA, it fully respected the State's interests in managing its own affairs.

In light of the nature of the violation and the State's preferred approach to compliance, there was

no alternative remedy that would have equally fulfilled those three remedial requirements. The remedy therefore was "essential." 20 U.S.C. § 1712.[4]

2. Notwithstanding the State's representations to the district court, the State, over the course of the next seven years, failed to determine the elements of an appropriate ELL program; failed to calculate the costs of such a program; and failed to relate funding for ELL programs to an assessment of the costs of an appropriate program. During that time, the district court took increasingly specific actions to bring about compliance with its judgment.

While the court initially issued a declaratory judgment, it subsequently issued an order requiring the State to determine the costs of an appropriate ELL program. J.A. 39. When that order failed to produce compliance, the court directed that the State's funding for ELL programs "shall not be arbitrary and capricious, but shall bear a rational relationship to the actual funding needed to implement language acquisition programs in Arizona's schools." J.A. 44. And when that order too failed to produce compliance, the court directed the State to comply with its original judgment by "appropriately and

---

[4] Although the legislator-intervenors attempt to invoke the remedial standards set forth in 20 U.S.C. § 1713, *see* Legislators' Br. 56, those standards by their plain terms apply only to *busing* remedies and thus have no application here. The legislator-intervenors likewise err in relying on the requirement in 20 U.S.C. § 1758 to give a school district notice and an opportunity to develop a voluntary remedial plan. *See* Legislators' Br. 56, 59. That requirement by its plain terms applies exclusively to *desegregation* remedies.

constitutionally funding the state's [ELL] programs." J.A. 393. In light of the State's repeated failure to comply with the 2000 judgment, the district court was fully justified in taking increasingly specific measures to induce compliance. *See Hutto v. Finney*, 437 U.S. 678, 688 (1978) ("[T]aking the long and unhappy history of the litigation into account, the court was justified in entering [an order] to insure against the risk of inadequate compliance.").

By the time of the 2007 hearing on petitioners' motion for relief under Rule 60(b)(5), the State still had yet to complete the process of establishing standards for an appropriate ELL program, much less identify the program costs. As the district court found, "many of the new standards are still evolving," and the State had not "established clear rules and requirements that can be fulfilled and followed." Pet. App. 100a. And the State still had not developed a "funding system that rationally relates funding available to the actual costs of all elements of ELL instruction." *Id.* at 111a.

3. The district court accordingly has never ordered funding for funding's sake. Instead, it has consistently tailored its orders to the costs that the State itself determined were necessary for an appropriate ELL program that the State itself devised. Even then, the court has required nothing more than a non-arbitrary relationship between funding and the costs of an appropriate program. And until recently, the court's approach accorded with the uniform views of the state parties on how the State would fulfill its EEOA obligations.

The district court's approach is not at all inconsistent with petitioners' repeated refrain that more money does not necessarily mean more effective programs, and that improved management can increase program effectiveness while reducing program costs. If the State were to determine that an appropriate program could be delivered at far less cost by improving program management, nothing in the district court's order stands in the way of the State's implementing that judgment: The district court has required only that the State's funding scheme not be arbitrary in relation to the State's own calculation of the costs of appropriate ELL programs that the State itself devises.[5]

---

[5] The district court's orders are wholly unlike the order disapproved by this Court in *Missouri v. Jenkins*, 515 U.S. 70 (1995). *See* Legislators' Br. 64-65; Superintendent's Br. 35-37, 49. That case addressed the imposition, as court-ordered remedies, of educational programs and facilities "not available anywhere else in the country," including a planetarium, green house, 25-acre farm, broadcast radio and television studios, temperature-controlled art museum, and movie editing and screening rooms. 515 U.S. at 79-80. Those programs and facilities aimed to attract private school and suburban students, an objective unconnected to remedying the constitutional violation in the case. *Id.* at 91-92. And the district court had permitted the plaintiffs and school districts to impose "the brunt of the costs" on the State. *Id.* at 79. Here, by contrast, the district court's orders allow the State to determine the programs necessary to overcome language barriers; the costs of those programs; and the funding for the programs, provided that funding bears a non-arbitrary relationship to program costs.

B. Petitioners May Not Relitigate The Validity Of The Court's Orders But Must Establish That A Significant Change In Fact Or Law Justifies Their Complete Dissolution

1. Against this backdrop of noncompliance, petitioners moved for relief from judgment pursuant to Rule 60(b)(5). Petitioners principally argued that the recently enacted HB 2064 satisfied the judgment. They also argued that improvements in the State's ELL program aside from HB 2064 warranted relief from judgment. The State itself opposed petitioners' motion, and a number of important principles govern the motion's proper resolution.

a. First, a motion for relief from judgment "is not a substitute for an appeal." 11 Wright, Miller & Kane, *Federal Practice & Procedure* § 2863, at 340 (2d ed. 1995). The movant thus may not attack the legal or factual validity of the underlying judgment. *Id.* That rule is grounded in basic principles of finality. An injunction, like any judgment, has attributes of "[f]irmness and stability," and "neither the plaintiff nor the court should be subjected to the unnecessary burden of re-establishing what has once been decided." *System Fed'n v. Wright*, 364 U.S. 642, 647 (1961).

Those basic principles of finality apply to injunctions directed to a state and its officials no less than injunctions directed to any other litigant. *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 391-92 (1992) (court entertaining a motion under Rule 60(b) should not inquire whether some provisions in the decree "could have been opposed with success if

the [government] defendants had offered opposition"). In such cases—as in all cases—Rule 60(b)(5) "does not allow relitigation of issues that have been resolved by the judgment." 11 Wright, Miller & Kane, *supra*, § 2863, at 340.

b. Second, in light of those finality considerations, a party seeking relief from judgment "must establish that a significant change in facts or law warrants revision of the decree." *Rufo*, 502 U.S. at 393. In cases involving an injunction directed to a state or its officials, that standard is particularly "flexible." *Id.* And in the event of a significant change, a court must give "significant weight" to the views of state officials on how to modify the judgment. *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 441-42 (2004) (quoting *Rufo*, 502 U.S. at 392 n.14). But it remains a precondition to such "flexibility" and "weight" that the movant demonstrate "a significant change in facts or law" warranting an "amendment." *Id.* at 441 (quoting *Rufo*, 502 U.S. at 392 n.14). Dissatisfaction with the decree—or with the decision of prior officials not to challenge the decree—fails to suffice. *Rufo*, 502 U.S. at 383, 391-92. And the burden rests squarely on the party seeking relief to establish changed circumstances warranting relief. *Id.* at 393.

c. Third, once the purposes of a decree have been fully satisfied, "responsibility for discharging the State's obligations" must be "returned promptly to the State and its officials." *Frew*, 540 U.S. at 442. At the same time, a party seeking to vacate a judgment based on satisfaction of its purposes cannot gain relief simply by demonstrating some measure of improvement in the underlying conditions giving rise

to the decree, particularly when the improvements may be fleeting. Full satisfaction of the purposes of a judgment can arise only when the violation and its effects are fully corrected and unlikely to recur. *Bd. of Educ. v. Dowell*, 498 U.S. 237, 247 (1991). In resolving that issue, a court considers whether there has been "good faith" compliance with the court's orders for a "reasonable period of time." *Id.* at 248-49.

2. Under those principles, petitioners were not free to litigate in their Rule 60(b)(5) motion the essential legal premises of the 2000 declaratory judgment and subsequent injunction orders. In particular, they could not revisit whether the lack of funding rationally related to the costs of a chosen ELL program can constitute a component of an EEOA violation. More fundamentally, they also could not revisit whether a district court possesses remedial authority to direct a state to ensure funding bearing a non-arbitrary relationship to the costs of the State's chosen ELL programs. Those issues were resolved in the court's 2000, 2001, and 2005 orders, and therefore were not open for relitigation on a Rule 60(b)(5) motion to dissolve those orders. *E.g.*, *System Fed'n*, 364 U.S. at 647.[6]

For the same reason, neither respondents nor the district court were required to reestablish *ab initio* the need for the court's remedial orders. *System*

---

[6] That finality principle applies to the legislator-intervenors even though they were not parties to the earlier orders because they seek to dissolve orders directed to the State (not to them), and because, insofar as they have standing at all, it is to represent "the interests of the State." *Karcher*, 484 U.S. at 76, 80.

Fed'n, 364 U.S. at 647. Petitioners instead were required to demonstrate that, although the court's remedy lay within its authority when issued, the remedy no longer remained essential to assure compliance with the EEOA because of factual changes brought about by HB 2064 or other improvements in the State's ELL program. *See Rufo*, 502 U.S. at 393; 20 U.S.C. § 1712.

In addressing that issue, the district court faced conflicting views from the State and its officials. On one hand, the State and its Board of Education asserted that the judgment's purposes remained unfulfilled and that the existing orders thus remained necessary. On the other hand, the Superintendent and legislator-intervenors asserted that the purposes of the judgment had been fulfilled, rendering the court's orders unnecessary. Unlike the situation in *Rufo* and *Frew*, there was no uniform state view to which the district court could give "significant weight." *Frew*, 540 U.S. at 441-42.[7]

Finally, insofar as petitioners sought relief on the ground that the purposes of the original judgment had been fully satisfied through HB 2064 or other significant changes, they could not rely on partial

---

[7] Contrary to the view of the legislators (*see* Legislators' Br. 40), each side must also be presumed to be acting in good faith. *See Miller v. Johnson*, 515 U.S. 900, 915-16 (1995). There is no basis for assuming that those representing the State and its Board of Education, by opposing the motion to dissolve, are shirking their state-law responsibilities to achieve political ends. And there is also no basis for presuming that petitioners, by seeking dissolution of the orders, are shirking their *federal*-law responsibilities to achieve political ends.

improvements in State compliance or improvements not shown to be durable. *Dowell*, 498 U.S. at 247-49. Instead, petitioners were required to show that their identified changes fully corrected the previous systemic violation of the EEOA and would ensure sustained compliance. *See id.* at 248 (dissolving desegregation decree is proper "after the local authorities have operated in compliance with it for a reasonable period of time").

Applying those principles, the district court acted within its discretion in declining to dissolve its orders based on HB 2064 or the other changes emphasized by petitioners. *See System Fed'n*, 364 U.S. at 648 (a district court has "wide discretion" to determine whether to vacate or modify a judgment in light of changed circumstances).

C. The Flaws In HB 2064 Preclude Dissolution Of The Court's Orders

In the district court, petitioners principally argued that HB 2064 brought the State into compliance with the EEOA and satisfied the court's previous orders. *See* Motion to Purge and Dissolve (Dkt. #422), at 1 (filed Mar. 24, 2006). Petitioners now seek to disassociate themselves from HB 2064 and rely instead on other asserted factual changes.

Petitioners, however, cannot escape the central relevance of HB 2064 in assessing whether the district court acted within its discretion in denying Rule 60(b)(5) relief. HB 2064 embodies the State's current and chosen approach to providing ELL programs and complying with its EEOA obligations. *See* p. 10, *supra*. It is the law that now governs the

actions the State will take in fulfilling EEOA requirements. If HB 2064 fails to provide sufficient assurance that the State will satisfy its EEOA obligations, the district court acted within its discretion in declining to vacate its orders. That would remain true even if state law before HB 2064 had assured EEOA compliance: It is HB 2064, not prior law, that presently governs the State's actions in fulfillment of the EEOA; and it is thus HB 2064, not prior law, that must assure EEOA compliance.

Petitioners' effort to sidestep HB 2064 is unsurprising. The law contains at least two flaws that preclude any showing that action in conformity with it could satisfy the purposes of the 2000 judgment. HB 2064 in those respects in fact sets back the State's ability to fulfill its EEOA obligations.

First, HB 2064 cuts off all Group B and SEI funding for ELL students after two years. Pet. App. 106a-107a. The district court found, however, based on uncontroverted evidence, that "two years is insufficient for many English Language Learners." *Id.* at 108; *see id.* at 105a-110a, 114a-115a. In Nogales, for example, it takes an average of "four to five years [for ELL students] to be reclassified as English proficient." *Id.* at 108a. Although HB 2064 provides certain funds for compensatory instruction beyond two years, those funds are highly limited and may be used only for summer or before- or after-school programs rather than ordinary classroom instruction. *Id.* at 107a. The district court calculated that, by limiting funding to two years in the face of a need for four to five years, HB 2064 effectively *reduces* annual group B weight funding for ELL students from

$365 to $182. *Id.* That change would turn back the clock to funding levels in 2000-01, when severe resource shortages led to the district court's finding of systemic EEOA violations. *See id.* at 41a, 90a.

Second, HB 2064 offsets against a school district's SEI funding the amount of the district's federal funding under Titles I-III. *See* A.R.S. § 15-756.01(I). Under the offset prohibition of NCLB, however, a "State shall not take" that federal funding "into consideration" when "determining the eligibility of any local educational agency [for] State aid, or the amount of State aid." 20 U.S.C. § 7902. And under the "supplement, not supplant" provisions in Titles I-III, federal funds must "supplement" other available funds "and in no case . . . supplant" them. *Id.* §§ 6314(a)(2)(B), 6315(b)(3), 6613(f), 6825(g). HB 2064's offset for federal funds flatly violates both the offset and the "supplement, not supplant" prohibitions. Pet. App. 86a, 113a-114a.[8] That feature of HB 2064, like its two-year cut-off, precludes petitioners from showing that the law satisfies the purposes of the judgment: While HB 2064 relies on federal funding to fulfill the State's EEOA obligations, federal law bars that approach.

Those two features of HB 2064 are of central significance in assessing whether the district court acted within its discretion in denying petitioners' Rule 60(b)(5) motion. The law's "stark two-year cut-off," when "combined with the very real possibility

---

[8] *See* J.A. 129-131 (expert testimony by former director of policy for Title I programs that "I've never seen such a blatant violation").

that the funding scheme may trigger federal enforcement action, may well reverse or retard whatever progress has been made." Pet. App. 89a-90a. With HB 2064 as the operative law, petitioners cannot demonstrate fulfillment of the purposes of the original judgment.

2. It bears noting that, absent its two fatal flaws, HB 2064 could potentially form the basis of a funding scheme that would satisfy the district court's judgment. Indeed, the district court recently indicated as much. Pet. App. 90a; J.A. 88-91. The court determined that HB 2064's structure for distributing state ELL funds—whereby the State promulgates instructional models, school districts calculate the models' incremental costs, and the SEI Fund makes up the shortfall in available funding—could bear a rational relation to the costs of the new ELL programs. *Id.* The court reached that conclusion even though HB 2064 takes a district-by-district rather than per-student approach to funding, and takes into account the funds available to districts from local sources.

The court thereby made clear its flexibility on the State's particular method of ensuring compliance with the EEOA and its willingness to defer to the State's policy choices. With the ELL instructional models contemplated by HB 2064 now having been completed while the case was pending in the court of appeals, the court of appeals saw "reason . . . to hope" that, if the specific deficiencies in HB 2064 were corrected, this litigation might "finally be nearing resolution." Pet. App. 90a. At this stage, however, the district court acted within its discretion in

declining to grant Rule 60(b)(5) relief on the basis of HB 2064.

D. The Other Factual Changes Identified By Petitioners Fail To Compel Dissolution Of The Court's Orders

Petitioners argue that improved ELL performance and programs and increased funding at Nogales demonstrate fulfillment of the judgment. As an initial matter, petitioners' focus on one school district is misplaced. The orders are state-wide orders, and although petitioners question the validity of the orders insofar as they extend beyond Nogales, that issue was resolved by the earlier orders and acquiesced in by the State. Indeed, the State affirmatively urged a statewide remedy because a "Nogales only" remedy "would run afoul of the Arizona Constitution's requirement" of "a general and uniform public school system." State C.A. Br. 60 (quoting Ariz. Const. art. XI § 1(a)). The state-wide nature of the court's orders therefore may not be revisited in a Rule 60(b)(5) motion. *E.g.*, *System Fed'n*, 364 U.S. at 647.

In any event, petitioners failed to establish fulfillment of the purposes of the judgment in Nogales. The district court recognized that there had been improvements in Nogales, particularly in the elementary and middle schools. Pet. App. 100a-101a. But it also found that "success at the high schools is not being accomplished." *Id.* at 100a. And it further determined that, absent compliance with its orders, any success would be "fleeting at best." *Id.* Those findings are supported by the record and demonstrate that the district court did not abuse its discre-

tion in declining to grant complete dissolution of its orders based on the improvements at Nogales.

1. Petitioners rely on student performance criteria to show improvements at Nogales. But two of the most pertinent performance criteria—the pace of reclassification and graduation rates—convincingly support the district court's findings. State law calls for students to become "English proficient" in one year, A.R.S. § 15-752, and HB 2064 eliminates funding for almost all ELL education services after two years. But the record revealed that Nogales ELL students now require an average of four to five years to attain reclassification. Pet. App. 108a. There is thus a significant gap between the State's expectations for ELL programs and the on-the-ground reality in Nogales. Of equal, if not greater significance, only 59% of Arizona ELL students graduate from high school, J.A. 195, and current NCLB reports reveal that the graduation rate for ELL students in Nogales is 66%.[9]

Petitioners cite recent performance on AIMS achievement tests as evidence of improvements. *See* Superintendent's Br. 28-29; Legislators' Br. 48. But it is difficult to reach any reliable judgments based on the results of those tests. Arizona has changed the AIMS test during the relevant period, both by altering the pass score and by twice changing the

---

[9] *See* Arizona Dep't of Education, School Report Cards, *available at* http://www10.ade.az.gov/reportcard (district-wide 10th grade reports in 2008). ELL subgroup performance data can be obtained from the Department of Education's School Report Cards web site by searching for or selecting the relevant school or district, year, subject, and grade level.

system for reclassifying students. Pet. App. 33a. In addition, there is no longitudinal data that would enable evaluating the progress of individual ELL students over time. *Id.*

Insofar as performance results on the AIMS test were relevant, they support the district court's findings. Nogales's ELL tenth graders performed far worse than its ELL third graders, and far worse than the state-wide averages for tenth graders. Pet. App. 38a-39a. Those results confirm what the other evidence establishes—that there remain serious deficiencies in Nogales's high school program. Moreover, ELL tenth graders failed math at a 76% rate, reading at a 78% rate, and writing at a 76% rate, far worse than the Nogales averages of 50%, 42%, and 39%, respectively. Pet. App. 39a. While some differences between ELL students and other students are to be expected, petitioners' own witness admitted that the performance of Nogales's high school ELL students was "not acceptable." J.A. 193-195; *see also* Tr. Day 6, at 125-126, 129.

In addition, an elementary school, a middle school, and both high schools in Nogales failed to make adequate yearly progress under NCLB. Pet. App. 39a. Petitioners assert (Superintendent's Br. 46) that the failures were unattributable to ELL students. But in a school system composed almost entirely of ELL or reclassified-ELL students, it is difficult to draw any sharp distinction between ELL and non-ELL students. Tr. Day 6, at 16-17. In any event, more recent data for 2006, 2007, and 2008 demonstrate that four of Nogales's 10 schools, including both high schools, failed to make adequate

yearly progress in at least one of those years because of the ELL subgroup.[10]

Petitioners highlight (Superintendent's Br. 46) certain AIMS test data showing that reclassified ELL students are performing as well as English speaking students. But even assuming those data were reliable, *but see* Tr. Day 6, at 113-114, they are far less significant than the slow pace at which students attain reclassification. Petitioners' reliance (Legislators' Br. 48-49) on data comparing Nogales ELL students to statewide averages is similarly unpersuasive. Petitioners note that, in a statewide ranking of 628 schools in 2005, "Nogales placed four schools in the top ten." *Id.* at 49. But they neglect to mention that Nogales's high schools rank "at the bottom of the heap," with Nogales's single largest school—the main high school—ranked in the bottom 10 percent, and its alternative high school ranked in the bottom one percent. Pet. App. 40a.

Petitioners also rely (Legislators' Br. 24) on conclusory statements by state officials (who work for the Superintendent) that Nogales's ELL programs are "excellent" or "exemplary." On cross-examination, however, those officials admitted that ELL student performance at the middle and high school levels was "not acceptable." J.A. 193-195. For all those reasons, the district court acted within its

---

[10] *See* Arizona Dep't of Education, School Report Cards, *supra* (district-wide 10th grade reading/writing in 2008, district-wide 8th grade reading/writing in 2007, alternative high school 10th grade math in 2006, Wade Carpenter Middle School 8th grade reading/writing in 2007, Lincoln Elementary School 3rd grade math and 5th grade reading/writing in 2008).

discretion in rejecting petitioners' claim that the performance data compelled granting them complete dissolution of the court's orders.

2. Petitioners contend that, as a result of improved program management, ELL programs in Nogales have achieved success. They cite improvements in class size, teacher quality, teacher salaries, compensatory programs, and instructional materials. Superintendent's Br. 47; Legislators' Br. 45. The record demonstrates, however, that significant programmatic deficiencies remain, and that those deficiencies reflect continuing resource constraints. *See* Pet. App. 36a.

Nogales, for instance, "cannot afford to pay market rates" for qualified ELL teachers. Pet. App. 66a; J.A. 225. It therefore must resort to long-term substitutes and instructors with "emergency" certification. Pet. App. 36a. Nogales also cannot afford teacher aides, even though its superintendent regarded them as "essential" to ELL program success. J.A. 225. Nor can Nogales afford additional tutors, whom the superintendent likewise considered essential. *Id.*

Average class sizes at Nogales remain high and cannot be reduced given current funding levels. The State's monitoring report revealed that one Nogales middle school has an average 31 students per class. J.A. 331. Half of Nogales's schools have average class sizes exceeding the "maximum" size contemplated by the State's newly promulgated models for pre-emergent and emergent ELL students, and 80% of Nogales's schools have average class sizes exceeding the corresponding "target" size. *See* J.A. 322-

337; Arizona ELL Task Force, Structured English Immersion Models, at 5 (Apr. 10, 2008), *available at* http://azed.gov/ELLTaskForce/2008/SEIModels04-10-08.pdf. And no school in Nogales approaches the class-size that the Arizona Department of Education had held out to school districts as its only research-based model for ELL instruction. Tr. Day 3, at 95-100.

3. Petitioners also err in seeking complete dissolution of the court's orders on the ground that Nogales has more funds with which to operate its programs than it had in 2000. Petitioners rely on the following sources of additional funds: Group B funds, federal funds, local funds, and base-level state funds. The district court reasonably concluded that those funding sources failed to assure that improvements would be sustainable, let alone would fully complete the job of providing an appropriate ELL program.

First, petitioners ignore the effect of HB 2064 on Nogales's continuing ability to operate its existing programs. As discussed, the practical effect of HB 2064 may be to halve Nogales's Group B funding for ELL students. Even the amount of Group B funds Nogales currently receives under pre-HB 2064 standards simply matches the amounts Nogales spent on its ELL programs in 2000. Pet. App. 43a & n.26. And the district court found that those programs were seriously deficient.

Moreover, while Nogales has received increased federal funding, under the federal "supplement, not supplant" prohibitions, Nogales may not spend those funds on its core ELL programs. Any current use of

federal money for that purpose violates federal law. While Nogales also has enacted two county overrides since the original district court judgment, there is no guarantee that Nogales can continue enacting such overrides in the future. And the amount of county override funds that Nogales devotes to its ELL programs in any event is exceedingly small—only $43.43 per student, Pet. App. 42a—hardly an amount sufficient to sustain its ELL program.

As a result, petitioners' argument that Nogales possesses adequate funding both to sustain its improvements to date and to remedy any remaining deficiencies ultimately amounts to a contention that Nogales has sufficient, base-level state funding that it can apply—and can continue to apply—to ELL programs. Nogales, however, likewise drew on base-level state funding to support its ELL programs at the time of the initial 2000 judgment. *See* Pet. App. 141a. And Nogales's ELL program at that time constituted a systematic failure. The district court had every reason to doubt petitioners' argument that what only recently produced a systematic failure could now produce enduring compliance.

Indeed, while state base-level funding has grown in certain measure, the extent of the increase when adjusted for inflation (based on the Department of Labor's CPI Index) amounts only to one percent. *See* Pet. App. 43a (listing per-student "[b]ase level state funds" from 1999-2000 to 2006-2006); U.S. Dep't of Labor, Bureau of Labor Statistics CPI Inflation Calculator, *available at* http://www.bls.gov/data/inflation_calculator.htm. Moreover, there are now additional competing demands on the base-level funds.

Local districts, for example, must satisfy NCLB adequate yearly progress standards for all students, not just ELL students. That competing demand not only limits the amount of base-level funds that Nogales can draw for ELL programs; it also means that Nogales's draw for ELL programs in the current year may require redirection to general programs in coming years.

Nor does anything in state law *require* Nogales to devote base-level state funds to ELL programs rather than to general academic programs. That is hardly surprising. The State presumably believes that its base-level funding represents the amounts necessary to "ensure that each student receives a basic education." Pet. App. 122a. It would raise issues of substantial public sensitivity if the State were to require school districts to satisfy the State's obligations to ELL students by redirecting base-level funds to them, at the expense of achieving the more general objective of ensuring a basic education for all its students. That is particularly true because Arizona continues to rank near the very bottom in overall state per-pupil spending. *See* ALEC Report Card, at 80 (2008), *available at* http://www.alec.org/am/pdf/ReportCard08.pdf (Arizona ranked 50th).

Any requirement that local districts achieve EEOA compliance by redirecting base-level state funding would also violate the Arizona Constitution. If the State compelled districts with large ELL populations to shift base-level funding to meet EEOA obligations, districts with large ELL populations would have fewer remaining funds to devote to the general academic program than districts with small ELL

populations. That resulting disparity would run afoul of the Arizona constitutional prohibition against the State's causing substantial disparities between districts in meeting its basic educational standards. *See Roosevelt*, 877 P.2d at 815-16.

For those reasons, the district court acted within its discretion in concluding that reliance on base-level state funding (or other funding) failed to assure enduring EEOA compliance. Absent such an assurance, the district court committed no abuse of discretion in declining to grant petitioners a complete dissolution of the court's orders. *See Dowell*, 498 U.S. at 247-49.

E. The Court Of Appeals Correctly Applied The Rule 60(b)(5) Standard

Petitioners contend that the court of appeals failed to apply the correct Rule 60(b) standard. That argument is both incorrect and beside the point.

Petitioners contend that the court of appeals applied the outdated "grievous wrong" standard of *United States v. Swift & Co.*, 286 U.S. 106 (1932), rather than the governing *Rufo* standard. The court of appeals, however, explicitly applied the *Rufo* standard. The court specifically held that that "[i]t is appropriate to grant a Rule 60(b)(5) motion" when "the party seeking relief from an injunction or consent decree [meets its initial burden by showing] a significant change either in factual conditions or in law." Pet. App. 49a (quoting *Agostini*, 521 U.S. at 215) (alteration in original, internal quotation marks omitted). The court of appeals also recognized that this is a "flexible standard." *Id.* at 50a.

Petitioners challenge (Legislators' Br. 37), as inconsistent with *Rufo*, the court of appeals' statement requiring petitioners to show "that the basic factual premises of the district court's judgment had been swept away, or that there has been some *change* in the legal landscape that makes the original ruling now improper." Pet. App. 63a. But that statement is simply a way of explaining how, in the particular context of this case, petitioners could demonstrate the requisite "significant change in facts or law." *Rufo*, 502 U.S. at 393. With respect to the remaining two remarks cited by petitioners (Legislators' Br. 37), one was simply a prediction of the likelihood that the *Rufo* standard would be satisfied in the case of a judgment neither appealed from nor complied with. Pet. App. 60a. And the other was a characterization of a legal conclusion reached by the district court. *Id.* at 72a. Neither affected the court of appeals' analysis of whether petitioners had shown a significant change under *Rufo*.

In any event, petitioners' criticism of certain statements by the court of appeals is ultimately beside the point. The district court articulated the correct standard under *Rufo*. And for the reasons explained, the district court's decision under that standard to deny a complete dissolution of its orders was not an abuse of discretion.[11]

---

[11] If this Court determined that both the court of appeals and district court applied an incorrect Rule 60(b)(5) standard, the proper disposition would be to remand to allow those courts to apply the proper standard in the first instance. *See Rufo*, 502 U.S. at 393.

III. THE EEOA'S COMPLIANCE STANDARD HAS NOT BEEN DISPLACED OR QUALIFIED BY NCLB'S FUNDING CONDITIONS

Petitioners contend that the very fact that a state has a NCLB plan that has been approved by the Secretary of Education automatically satisfies a state's obligation under the EEOA to take appropriate action to overcome language barriers. Legislators' Br. Pet. 57; Superintendent's Br. 58. There is no evidence that Congress intended that result.

A. The EEOA Requires A State To Implement Practices, Resources, And Personnel Necessary To Overcome Language Barriers

The text of the EEOA provides that "[n]o State shall deny equal education opportunity" by "the failure by [a State or local] educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. § 1703. Consistent with the ordinary meaning of "take appropriate action," the Fifth Circuit in *Castaneda v. Pickard*, 648 F.2d 989 (1981), held that an educational agency must "actually use[]" "programs and practices" that are "reasonably calculated to implement effectively the educational theory adopted by the school." *Id.* at 1008, 1010. The agency therefore must "follow through with practices, resources, and personnel necessary to transform theory into reality." *Id.*

Castaneda also prescribed two additional inquiries: whether the educational agency's instructional theory is educationally sound, *id.* at 1009, and

whether the implemented programs have, after a reasonable period, resulted in "parity of participation with other students," *id.* at 1009-10. But the key inquiry under *Castaneda* ordinarily is whether an educational agency has followed through with practices, resources, and personnel reasonably calculated to overcome language barriers.

From the time of the decision in 1981 through the enactment of NCLB more than 20 years later, *Castaneda* served as the governing legal standard for compliance with the EEOA. All courts that considered the issue embraced *Castaneda*'s interpretation of the EEOA. *See* p. 2 n.1, *supra*. And the federal agencies responsible for enforcement of the EEOA and the parallel Title VI regulations similarly applied (and continue to apply) *Castaneda* in exercising their enforcement responsibilities. *Id.*

During that period, the relevant EEOA analysis focused on "inputs," such as whether educational agencies provided qualified ELL teachers, *Castaneda*, 648 F.2d at 1012, adequate teacher training, *id.* at 1013, proper student testing, *id.* at 1014, sufficient daily time for learning English, *United States v. Texas*, 680 F.2d 356, 371 (5th Cir. 1982), appropriate criteria for advancing from an ELL program to the general program, *id.*, sufficient funding, *id.* at 372, and adequate monitoring of programs, *Gomez v. Ill. State Bd. of Educ.*, 811 F.2d 1030, 1043 (7th Cir. 1987). Indeed, petitioners recognize that appropriate actions for EEOA purposes included "hiring qualified teachers, employing adequate texts, and reducing class size." Superintendent's Br. 38.

It must be presumed that Congress understood this state of the law when enacting NCLB. *Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788, 797 (2009). In particular, Congress presumably knew that the EEOA, for more than twenty years, had been interpreted to require States to put in place practices, resources, and personnel appropriate to overcome the language barriers of ELL students. The question therefore is whether Congress, in enacting Title III of NCLB, intended to replace that long-settled standard for demonstrating a state's EEOA compliance with one simply requiring a state to possess an approved NCLB plan. *See id.* at 793-94 ("The crucial consideration is what Congress intended.") (internal quotation marks and alteration omitted).

B. The Text Of NCLB Establishes That An Approved Plan Is Simply A Funding Condition

Nothing in the text of NCLB so much as hints at such an intent. The provision on which petitioners rely specifies that a state must submit a plan to the Secretary of Education that "describe[s]" how the State plans to establish standards for raising the level of English language proficiency, to ensure that local educational agencies receiving a subgrant will assess the proficiency of ELL students, and to hold such local educational agencies accountable if ELL students, as a group, fail to make adequate yearly progress in accordance with the state-chosen standards. 20 U.S.C. § 6823(a), (b)(2), (b)(3)(C) and (D), (b)(5). Section 6823 prescribes the submission of a plan addressing those areas as a precondition to Ti-

tle III funding. It nowhere states or implies that submission of a plan could constitute compliance with the EEOA. And the Secretary's approval of a plan simply means that the plan "meets the requirements of *this section*." 20 U.S.C. § 6823(c) (emphasis added). Section 6823(c) does not state or imply that the Secretary's approval of a plan establishes compliance with the EEOA.

In approving a plan, moreover, the Secretary has no occasion to address whether the State is meeting its EEOA obligations. Instead, the Secretary considers whether the State has "describe[d]" how it will address the matters of standards, testing, and accountability. 20 U.S.C. § 6823(b) and (c). In deciding whether to approve a plan, the Secretary thus does not conduct a substantive review of the adequacy of the State's ELL education program, much less determine whether the State is following through with appropriate "practices, resources, and personnel," *Castedana*, 648 F.2d at 989, 1010, necessary "to overcome language barriers that impede equal participation" in instructional programs. 20 U.S.C. § 1703(f). Accordingly, the existence of an approved NCLB plan simply makes a state eligible for NCLB funding; it cannot establish that a state is complying with the EEOA. *See* U.S. Dep't of Justice, Educational Opportunities Section Cases on English Language Learners, *available at* http://www.usdoj.gov/crt/edo/caselist.php (post-NCLB consent agreements requiring specific actions under the EEOA even though state possessed an approved NCLB plan).

Had Congress intended for an approved NCLB plan to establish compliance with the EEOA, it could have easily said so. It could have simply added a provision to 20 U.S.C. § 6823 stating: "the submission of a plan pursuant to this Section that is approved by the Secretary shall fulfill a State's obligations under 20 U.S.C. § 1703(f)." The absence of such a provision cannot be attributed to congressional oversight. NCLB contains a level of detail rare for any federal statute imposing conditions on state and local governments. *See, e.g.*, 20 U.S.C. § 6311. It is highly unlikely that a Congress engaged at that level of detail would have inadvertently failed to note that its funding conditions displaced long-settled standards for EEOA compliance.

Indeed, far from expressing any intent to displace the EEOA's established compliance standards, Congress specified that "[n]othing in this part shall be construed in a manner inconsistent with any federal law guaranteeing a civil right." 20 U.S.C. § 6847. That provision reinforces Congress's intent to refrain from disturbing the established meaning of existing civil rights laws, including the EEOA. Petitioners' effort to replace the established EEOA standard with an approved-NCLB-plan standard conflicts with that intent.

C. Petitioners' Approach Would Replace The EEOA's Mandatory Duty And Private Right Of Action With A Voluntary Condition Enforceable Only By The Secretary

The structural differences between the EEOA and NCLB further undermine petitioners' argument.

The EEOA imposes a mandatory duty on all states to take appropriate action to overcome language barriers of ELL students; it creates an individual private right of action for each ELL student; it requires a court to determine whether the state is taking appropriate action; and it authorizes a court to order a judicial remedy upon finding a violation. *See* 20 U.S.C. §§ 1703(f), 1706, 1712.

By contrast, NCLB imposes duties on a state only if it voluntarily assumes them by accepting Title III funds. The state's voluntarily-assumed duties are owed to the Secretary of Education, not to any individual. And the Secretary, not a court, determines whether the funding conditions have been satisfied, and if not, how to remedy non-compliance. 20 U.S.C. § 6311(e).

Petitioners' theory thus would require concluding that Congress, without saying so expressly, intended for funding conditions that are voluntarily assumed and enforceable only by the Secretary to serve as the full measure of compliance with a distinct statute that creates mandatory duties, individual rights, and judicially enforceable remedies. Petitioners cite no statutory or judicial precedent supporting that counterintuitive result. Any such inference is particularly implausible in light of the nature of NCLB and its funding conditions, and the implications for the EEOA private right of action.

To begin with, Congress in NCLB authorized expenditure of Title III funds only "for each of the 5 succeeding fiscal years." *See, e.g.*, 20 U.S.C. § 6801(a)(1). Continuation of NCLB funding beyond the initial five years therefore requires a new au-

thorization or an appropriation each year. It is unlikely enough that Congress would displace a fixed mandatory duty with conditions arising only if a state voluntarily accepts federal funds. But it is all the more unlikely that Congress would do so when the funding statute authorized the expenditure of funds only for a finite period.

Moreover, petitioners' theory has profound implications for the scope of the EEOA private right of action. *Every* state possesses an NCLB plan approved by the Secretary of Education. *See* p. 3, *supra*. Petitioners' theory therefore would entirely displace the private right of action expressly provided by Congress against the state, and would eliminate the role expressly given by Congress to courts to assess a state's fulfillment of its obligation to take appropriate action. That would remain true even if a state failed to follow through with any of the practices, resources, or personnel necessary to overcome language barriers, and even if school districts systematically failed to meet NCLB's adequate yearly progress objectives for ELL students. As long as a state possessed a testing and accountability plan approved by the Secretary, ELL students would relinquish their right to appropriate action from the state, and a court would relinquish its power to afford redress. Petitioners offer no persuasive evidence that Congress intended that highly improbable result.[12]

---

[12] Petitioners' approach would also give rise to innumerable line-drawing problems lacking any grounding in the statutory text. Petitioners argue that their theory would leave room for an individual to bring a challenge to a particular school's treatment of him as an "individual abuse." Superintendent's Br. 59;

D. The Differences In The Scope Of The Two Statutes Confirm That NCLB Does Not Displace The EEOA

This Court has established that, when the scope of a later-enacted statute is "narrower" than a pre-existing statute "in some respects" and "broader in others," the most natural inference is that Congress intended the more recent statute to supplement, rather than displace, the earlier statute. *Fitzgerald*, 129 S. Ct. at 796. That principle fully applies here.

In significant respects, NCLB is narrower in scope than the EEOA. First, NCLB focuses primarily on outputs in the form of testing results. *See* Legislators' Br. 13, 62-63. It does not address the appropriate inputs necessary to overcome language barriers and ensure equal participation by ELL students, such as qualified teachers, appropriate class sizes, and suitable instructional materials. The EEOA, by contrast, requires implementation of such inputs. *See* Superintendent's Br. 38.

Second, NCLB is narrower than the EEOA in the academic subjects it addresses. NCLB requires testing students only in math, English, and science. 20

Legislators' Br. 60. But that category lacks any textual basis and is by no means self-defining. The private right of action in any event includes challenges to systemic failures as well as "individual abuses." *See* 20 U.S.C. §§ 1703(f), 1720(a) (defining educational agencies required to take appropriate action as encompassing both state and local educational agencies). And most violations of the EEOA derive in some measure from broader, systemic failures. Petitioners' approach would eliminate that crucial component of the private right of action without any evidence that Congress desired that result.

U.S.C. § 6311(b)(1)(C). The EEOA, by contrast, requires equal participation in the full range of academic subjects, *see id.* § 1703(f), including, for instance, foreign languages, civics and government, economics, arts, history, and geography.

Third, NCLB aims to ensure that ELL students satisfy a minimum proficiency standard set by the State itself. It does not condition funding on the establishment of plans to ensure that ELL students have equal access to the full spectrum of instructional programs, including advanced placement classes or gifted programs. The EEOA, by contrast, requires appropriate action to afford equal access to all instructional programs. *See* 20 U.S.C. § 1703(f).

Fourth, NCLB's testing requirements for ELL students are confined in reach in some respects. For example, NCLB requires no subgroup testing in schools with fewer than 40 ELL students. 20 U.S.C. § 6311(b)(2)(C)(v)(II)(dd). States also need not test recently arrived students. 34 C.F.R. § 200.6(b)(4). And federal guidance allows States to include former ELL students in the ELL subgroup for two years after those students gain proficiency. *Id.* § 200.20(f)(2). The EEOA, by contrast, requires appropriate actions for all ELL students, not only those who attend school with at least 39 other ELL students. The EEOA requires appropriate actions for recently arrived students as well as students who arrived more than a year beforehand. And the EEOA does not automatically accept, as the full measure of appropriate action, yearly progress measures potentially affected by the inclusion of students already proficient in English.

While NCLB is "narrower" than the EEOA in those respects, it is "broader in others." *Fitzgerald*, 129 S. Ct. at 796. First, with respect to student testing, NCLB establishes conditions at a level of detail far exceeding anything required by the EEOA. Among other requirements, NCLB specifies in detail who must be tested, how often, and on what subjects; who must be consulted in developing annual measurable objectives; how the testing data must be computed and reported; and how much progress must be made each year. 20 U.S.C. § 6311(b). The EEOA "appropriate action" requirement does not establish obligations at that level of detail.

Second, when schools fail to achieve the required adequate yearly progress, NCLB contemplates accountability measures extending beyond any conventional judicial remedy. Such measures include withdrawal of funds, replacement of staff, and turning over of the school's management to a private contractor or the State. 20 U.S.C. §§ 6316(b)(7)(C), 6316(b)(8), 6842(b)(4).

In short, while the two statutes may share overlapping purposes in some measure, they employ markedly distinct means. In such circumstances, the only possible conclusion is that NCLB supplements, rather than displaces, the EEOA's preexisting compliance standards. *Fitzgerald*, 129 S. Ct. at 796. In fact, NCLB expressly provides that funding shall supplement, rather than supplant, the funding for required programs, including programs required by the EEOA. 20 U.S.C. § 6825(g); U.S. Dep't of Education, Supplement Not Supplant Provision of

Title III of the ESEA, *available at* http://www.ed.gov/programs/sfgp/supplefinalattach1.doc.

It is not at all unusual for new statutes to supplement rather than displace preexisting civil rights statutes. "[L]egislative enactments in" the area of civil rights "have long evinced a general intent to accord parallel or overlapping remedies." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *see CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951, 1960 (2008) (describing series of decisions holding that the "overlap" between earlier and later civil rights statutes "reflects congressional design"); *Fitzgerald*, 129 S. Ct. at 796-97 (Title IX and § 1983); *Wright v. Roanoke Redev. & Housing Auth.*, 479 U.S. 418, 429 (1987) (Housing Act and § 1983); *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 461 (1975) (Title VII and § 1981); *see also Marek v. Chesny*, 473 U.S. 1, 24-26 (1985) (Brennan, J., dissenting) (Title VII and Equal Pay Act); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 416-17 & n.20 (1968) (Fair Housing Act and § 1982); *Barnes v. Gorman*, 536 U.S. 181, 184-85 (2002) (ADA and Section 504 of the Rehabilitation Act).

Those examples involve situations in which Congress added a new private remedy. But given Congress's general desire to preserve private civil rights remedies, Congress would be even less likely to intend that a funding condition enforceable only by the

federal government displace a preexisting and express private remedy.[13]

Petitioners contend that interpreting NCLB plan approval as the measure of EEOA compliance is necessary to avoid a conflict between the statutes. Legislators' Br. 53; Superintendent's Br. 54, 58. There is no conflict. A state can carry out NCLB's testing and accountability measures and also follow through with practices, resources, and personnel required by the EEOA to overcome language barriers. Petitioners fail to explain how fulfilling both obligations would create any conflict. And the possibility of a conflict seems particularly remote because a state is always free to modify its NCLB plan. *See* 20 U.S.C. § 6823(d)(1)(B). In any event, whatever the potential for conflict in theory, nothing in Arizona's approved plan precludes complying with the district court's order to identify the elements of an appropriate ELL program and ensure funding rationally related to program costs. *See* Arizona Consolidated State Application Accountability Workbook at 44 (July 3,

---

[13] Of the cases petitioners cite, only *United States v. Fausto*, 484 U.S. 439 (1988), interprets a subsequent statute to displace a pre-existing private right of action. In that case, the Court held that the Civil Service Reform Act (CSRA) displaced a judicially-recognized action under the Back Pay Act. But that was because the CSRA aimed to replace a patchwork of preexisting remedies with a new comprehensive remedy, and it would have undermined that purpose to allow an action expressly disallowed under the CSRA to proceed under the Back Pay Act. *Id.* at 443-44, 448-49. That is far removed from the situation here.

2008), *available at* http://www.ed.gov/admins/lead/account/stateplans03/azcsa.pdf.

Finally, petitioners argue that an EEOA remedy is never "essential" when a state has an approved NCLB plan. Legislators' Br. 56. But that is simply a repackaging of their primary argument that an approved NCLB plan automatically satisfies the EEOA obligation to take appropriate action. An approved NCLB plan affords no automatic guarantee that a state is actually following through with the practices, resources, and personnel necessary to overcome language barriers that impede equal access to instructional programs. And when a state fails to take such actions, a judicial remedy is "essential," regardless of whether the state may have an approved NCLB plan.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

WALTER DELLINGER
HARVARD SUPREME COURT
AND APPELLATE CLINIC
1575 Massachusetts Ave.
Cambridge, MA 02138

TIMOTHY M. HOGAN
JOY E. HERR-CARDILLO
ARIZONA CENTER FOR LAW
IN THE PUBLIC INTEREST
202 E. McDowell Rd.
Phoenix, AZ 85004

SRI SRINIVASAN
(Counsel of Record)
IRVING L. GORNSTEIN
RYAN W. SCOTT
JUSTIN FLORENCE*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

**Admitted only in Massachusetts*

March 18, 2009

REPLY BRIEF

(27) (29)

Nos. 08-289 and 08-294 (Consolidated)

FILED

APR 9 - 2009

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF ARIZONA,

Petitioner,

v.

MIRIAM FLORES, et al.,

Respondents.

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES, et al.,

Petitioners,

v.

MIRIAM FLORES, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONER SUPERINTENDENT

ERIC J. BISTROW,
Counsel of Record
DARYL MANHART
MICHAEL S. DULBERG
MELISSA G. IYER
BURCH & CRACCHIOLO, P.A.
702 E. Osborn, Suite 200
Phoenix, Arizona 85014
phone: 602-274-7611
fax: 602-234-0341

Attorneys for Petitioner Superintendent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

BOTH 4FNETT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. The Superintendent Has Standing 1

II. The Lower Courts Failed to Identify a Continuing Violation of Federal Law 4

A. The Lower Courts Wrongly Measured Compliance in Terms of Funding, Not Programming 4

B. Plaintiffs Continue to Improperly Frame the Issue of Compliance in Terms of Funding 8

III. Rule 60(b)(5) Relief Was Justified Because Fundamental Changes in ELL Programming and Funding Show that Appropriate Action Was Taken 10

A. The General Themes of Changed Circumstances and Program Compliance Have Not Been Challenged 10

B. Alleged Problems With NUSD's ELL Program Are Unsupported by the Record and Do Not Warrant Continued Federal Oversight 12

i. The Focus on NUSD is Proper 12

ii. Reclassification Rates at NUSD Show Positive Results 13

iii. Graduation Rates Provide No Help in Determining "Appropriate Action" 14

TABLE OF CONTENTS – Continued

Page

iv. ELL Students' AIMS Test Scores Are Irrelevant 15

v. High School Performance Data Cited by Plaintiffs Is Misleading.... 15

vi. There Are Sufficient Qualified Teachers..... 17

vii. There Is Sufficient Tutoring..... 19

viii. Teacher Aides Are Not Critical..... 19

ix. Class Sizes Are Not an Issue..... 20

x. All Sources of Funding Should Be Considered..... 22

xi. Program Compliance, Not Perfection, Is All that Is Required..... 24

xii. Program Compliance Has Been Achieved 27

IV. House Bill 2064 Is Irrelevant..... 27

V. The Parties Agree that NCLB Supplements, but Does Not Displace the EEOA 28

A. That State Compliance with NCLB Is Voluntary Has No Bearing on the Need to Interpret the EEOA Consistently with It..... 32

B. NCLB, like the EEOA, Requires Positive Results 32

CONCLUSION..... 34

TABLE OF AUTHORITIES

Page

CASES

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 3

Bd. of Educ. v. Dowell, 498 U.S. 237 (1991) 7

Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981) ..... *passim*

Citizens v. Schafer, 872 F. Supp. 689 (D.N.D. 1995), *reversed in part*, 83 F.3d 1008 (8th Cir. 1996) 25

Clarke v. Coye, 60 F.3d 600 (9th Cir. 1995) 7

Glover v. Johnson, 138 F.3d 229 (6th Cir. 1998) 7, 9

In re School Asbestos Litig., 56 F.3d 515 (3d Cir. 1995) 12

Keyes v. Sch. Dist. No. 1, Denver, Colo., 576 F. Supp. 1503 (D. Colo. 1983) 25

Lockyer v. Mirant Corp., 398 F.3d 1098 (9th Cir. 2005) 3

Milliken v. Bradley, 433 U.S. 267 (1977) 8

Missouri v. Jenkins, 515 U.S. 70 (1995) 7, 8, 9

Reed v. Rhodes, 1 F. Supp. 2d 705 (N.D. Ohio 1998) 17

Toussaint v. McCarthy, 801 F.2d 1080 (9th Cir. 1986) 24

United States v. City of Miami, 664 F.2d 435 (5th Cir. 1981) 3

TABLE OF AUTHORITIES – Continued

Page

United States v. City of Yonkers, 197 F.3d 41 (2d Cir. 1999) 17

United States v. Sweeney, 914 F.2d 1260 (9th Cir. 1990) 4

Youngberg v. Romeo, 457 U.S. 307 (1982) 20

FEDERAL STATUTES

20 U.S.C. §6812(9) 30

20 U.S.C. §6823 30

20 U.S.C. §6826 30

20 U.S.C. §6842 30

House Bill 2064 ..... *passim*

FEDERAL RULES

Fed. R. Civ. P. 60(b)(5) ..... *passim*

STATE STATUTES

Ariz. Const. art. V 2

A.R.S. §15-241(Q) 19

A.R.S. §15-251 ..... 1, 2

A.R.S. §15-741 30

A.R.S. §15-752 13

A.R.S. §15-756 ..... 2, 3

A.R.S. §15-756.04 2

TABLE OF AUTHORITIES – Continued

Page

A.R.S. §15-756.05 2

A.R.S. §15-756.06 2

A.R.S. §15-756.07 3

A.R.S. §15-756.08 3

A.R.S. §15-756.11 3

A.R.S. §15-809 19

A.R.S. §15-910(G) 14

ARGUMENT

I. The Superintendent Has Standing.

Plaintiffs assert that the Superintendent lacks standing because he purportedly has no policymaking authority over matters covered by the judgment and that such policymaking falls within the ambit of the State Board of Education pursuant to Arizona Revised Statutes ("A.R.S.") §15-251(3) and (5).[1] This is curious since Plaintiffs sued the Superintendent because he "systematically . . . failed and refused to provide fiscal as well as other resources" to provide proper ELL programs and "encouraged" school districts to violate federal law. CR 83, ¶¶ 28 & 29. Indeed, the original 2000 order, which the Superintendent seeks to vacate, was directed against him.[2]

---

[1] Plaintiffs also state that perhaps "only the Governor" could have directed an appeal in this case when a conflict exists among executive officers. Plaintiffs' Br. 22. Indeed, Arizona's current governor, the Honorable Janice Brewer, instructed the Attorney General of Arizona to join in the positions advanced by both the Superintendent and the Intervenor-Defendants. *See* Addendum A (Governor's letter). By plaintiffs' logic, this Court should ignore the Respondent brief filed by the Arizona Attorney General, purportedly representing the interests of the "State," given the instruction by the Governor that the State be aligned with Petitioners, and treat the Superintendent's brief as that of the State.

[2] In the Second Appeal, the Ninth Circuit held the Superintendent has standing because he supervises Arizona's educational system, has a vital stake in funding issues that affect the programs he oversees, and the original 2000 order, which he

(Continued on following page)

The Superintendent was elected to supervise the public school system. Unlike the Board of Education, whose members are appointed by the Governor, the Superintendent is elected and directly responsible to the voters of the State of Arizona. *See* Ariz. Const. art. V, §1. One of the critical responsibilities of the Superintendent is to "superintend" the schools of Arizona and that is separate and apart from any powers given to the Board of Education. A.R.S. §15-251(1).

When dealing with ELL issues, the Superintendent has broad and explicit authority. In all of the following examples, the Superintendent makes policy independently and without the supervision or oversight of the Board. The Superintendent is solely responsible for the identification and assessment of ELL students. A.R.S. §15-756(A), (B), (C). The Superintendent, not the Board, administers and distributes monies from the structured English immersion fund. A.R.S. §15-756.04. The Superintendent is solely responsible for securing "the maximum amount of federal funding" for ELL programs. A.R.S. §15-756.04(D). The Superintendent also has exclusive powers in determining the English language proficiency and reclassification of ELL students. A.R.S. §15-756.05. The Superintendent, not the Board, prescribes how ELL students are to be reevaluated once they exit ELL programs. A.R.S. §15-756.06. The Superintendent, and not the Board, develops

---

seeks to lift, found him to be in violation of the EEOA. App. 53-55.

guidelines to ensure compliance by schools with federal and state laws regarding ELL students. A.R.S. §15-756.07. Further, it is the Superintendent who "direct[s] the office of English language acquisition services" and assesses ELL programs for "programmatic effectiveness." A.R.S. §15-756.08. The Superintendent, through the Arizona Department of Education ("ADE"), also decides whether a school district complies with federal or state laws. A.R.S. §15-756(C). The Superintendent, not the Board, has sole authority to distribute monies for ELL students from the compensatory instruction fund. A.R.S. §15-756.11. By virtue of these sweeping powers over ELL issues, the Superintendent – more than any other executive officer or board – has a vital stake in the outcome of this lawsuit. Moreover, the orders of the District Court, in large part, have not only been directed at the Superintendent, but they also challenge his professional judgment that program compliance with federal law has been achieved.

A defendant has standing to appeal so long as he has a "direct stake in the outcome" of the appeal. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997). Indeed, any co-defendant has an absolute right to challenge an injunction that adversely affects his interest. *United States v. City of Miami*, 664 F.2d 435, 445 (5th Cir. 1981). Standing to appeal further exists when a party cannot fulfill the functions of his office. *Lockyer v. Mirant Corp.*, 398 F.3d 1098 (9th Cir. 2005). Finally, a party "has standing to object to orders specifically directing [him] to take or refrain

from taking action." *United States v. Sweeney*, 914 F.2d 1260, 1263 (9th Cir. 1990).

II. The Lower Courts Failed to Identify a Continuing Violation of Federal Law.

When the original 2000 order was entered, NUSD employed a bilingual and English as a second language (bilingual/ESL) program of ELL instruction. That program was broken. The District Court found that at least part of the problem was funding. Hiring dual language teachers was difficult. Because of Proposition 203, NUSD turned to structured English immersion strategies (SEI) where programming was only offered in English. Therefore, it no longer needed additional funding to hire bilingual teachers to implement an effective ELL program. The record shows the SEI program was effective at current funding levels. Yet, Plaintiffs persuaded the lower courts to continue focusing, not on whether "appropriate action" was being taken to teach English, but on State earmarked funding remedies even though there was no longer a violation of the EEOA. That misguided approach fails to consider the fundamental issue by which EEOA §1703(f) compliance is to be determined – has "appropriate action" been taken?

A. The Lower Courts Wrongly Measured Compliance in Terms of Funding, Not Programming.

The most important point made at the 2007 Rule 60(b)(5) hearing was that, due to changed circumstances

since 2000, NUSD complied with the EEOA. *Castaneda v. Pickard*, 648 F.2d 989, 1010 (5th Cir. 1981), held that the touchstone for addressing "appropriate action" compliance with EEOA §1703(f) is whether ELL programs are reasonably calculated to permit ELL students to overcome their language barriers. NUSD met the *Castaneda* test in 2007. The evidence was overwhelming that this was the case because of different ELL theories of instruction, deep state and federal involvement, better management, and increased funding. Neither the District Court, the Ninth Circuit, nor the Plaintiffs in their brief claim that NUSD failed to afford its ELL students a reasonable opportunity to learn English. Their main concern was not with programming, but with remedial orders requiring earmarked funding to pay for the incremental costs of ELL programming.

The District Court's March 22, 2007 order ignored specific evidence that the educational deficiencies identified in the original 2000 order (bilingual/ESL) had been addressed and remedied under a different ELL theory of instruction (SEI). Although the District Court admitted that NUSD's ELL program had "substantially" improved since 2000 and that the Superintendent provided "much more" in terms of "standards" and "oversight," it nevertheless vaguely stated, *without citing any supporting facts*, that "NUSD's success is fleeting at best, particularly as it pertains to NUSD's high school students." The District Court's order did not otherwise address program compliance.

Instead, the District Court erroneously accepted Plaintiffs' position that the case was about earmarked funding. The District Court's sole focus was the propriety of the funding mechanisms of the yet to be implemented House Bill 2064. The Rule 60(b)(5) motion was denied, not because of the inadequacy of NUSD's ELL program, but because "HB 2064 fails to satisfy this Court's judgment because it does not provide funding for ELL instruction . . . that is rationally related to the cost of that instruction." App. 99, 113.

The Ninth Circuit trod the same path as the District Court. It changed the *Castaneda* test of program sufficiency to one of "resource" sufficiency. App. 8. It also defined compliance with the EEOA not in terms of programs, but in terms of earmarked funding. The Ninth Circuit specifically found that it would not "absolve the State from providing adequate ELL incremental funding." It concluded that in weighing Rule 60(b)(5) relief, "incremental funding is what matters for EEOA purposes." App. 70. As a consequence, no matter how effective an ELL program might be, Arizona could never attain relief from the original 2000 order until state earmarked funds covered the incremental cost of ELL programs. In short, compliance was measured solely in terms of funding.

The Ninth Circuit also scoured the record to tarnish NUSD's ELL programs. Those efforts sought support for the notion that "incremental funding is what matters for EEOA purposes." The Ninth Circuit

never claimed, however, that these purported blemishes undercut the Superintendent's argument that NUSD instituted an integrated system of ELL education that provided programs reasonably calculated to overcome language barriers. Those blemishes recited are grossly exaggerated and do not detract from the fact that NUSD, in the words of Plaintiffs' own witness, Dr. Zamudio, conducts effective ELL programs, and meets federal ELL requirements. Tr.Day6, pp.84, 98.

"[T]he scope of federal relief against an agency of state government must always be narrowly tailored to enforce federal constitutional and statutory language only . . . federal courts must be sensitive to the need for modification when circumstances change." *Clarke v. Coye*, 60 F.3d 600, 604 (9th Cir. 1995). This principle is echoed in *Glover v. Johnson*, 138 F.3d 229, 242 (6th Cir. 1998): "terminating judicial oversight is an objective to be affirmatively strived for, not simply an event that we welcome if it happens to occur." Involvement of federal courts to rectify violations of federal law should be seen as "temporary measures" that should end once compliance is achieved so control promptly may be returned to "state and local authorities." *Missouri v. Jenkins*, 515 U.S. 70, 88-89 (1995). Remedial orders "are not intended to operate in perpetuity." *Bd. of Educ. v. Dowell*, 498 U.S. 237, 247 (1991).

Had the District Court and the Ninth Circuit followed the foregoing principles, they would have determined first and foremost whether in 2007,

NUSD conducted a program that complied with §1703(f). They failed to do so because they improperly followed Plaintiffs' false direction found in their answering brief (p. 33) filed in the Ninth Circuit in the Second Appeal:

> In determining whether the judgment has been satisfied, the issue is not whether the needs of ELL students have been met but whether the State has established a funding system for ELL students and programs that is not arbitrary.

B. Plaintiffs Continue to Improperly Frame the Issue of Compliance in Terms of Funding.

Plaintiffs assert that the District Court followed the federalism principles enunciated in cases such as *Milliken v. Bradley*, 433 U.S. 267, 288-89 (1977), and *Missouri v. Jenkins*, because the District Court did not direct the defendants to employ a particular program or funding scheme. *See* Plaintiffs' Br. 23-29. This contention is misplaced. The basic aim of the Plaintiffs' lawsuit was compliance with EEOA §1703(f) so that effective ELL programs were instituted. Had NUSD's old bilingual/ESL program been effective in 2000, its funding would not have been addressed.

Plaintiffs narrowly frame the issue as all about state earmarked funding and from this they assert

that the District Court's remedial orders were carefully calibrated. Plaintiffs fail to recognize that in 2007, under a different theory of language instruction and with different programming, NUSD conducted effective ELL programs. Once compliance with §1703(f) was demonstrated, there was no need to require the state to perform studies and create special streams of income. Remedies must be connected to a violation of federal law. *Missouri v. Jenkins*, 515 U.S. at 88.

The *Glover* Court, in remanding for a Rule 60(b)(5) hearing, noted that the crucial inquiry for a district court to consider was whether the prior violations of federal law "continue to exist today" and not to fight over remedial issues. 138 F.3d at 242. The Sixth Circuit succinctly stated the principle as follows:

> All involved in this litigation must bear in mind that the details of the district court's remedial plans and orders are not ends in themselves; they are only a means to an end. If the defendants can demonstrate that they have remedied the constitutional violations found in 1979, even without compliance with the details of previous orders or plans, they must be permitted to do so. And if they do so, federal court oversight must terminate.

Id. at 243.

Contrary to Plaintiffs' assertion, requiring a state to tax its citizens for earmarked funding when there is no longer a violation of federal law confuses means with ends and constitutes funding for the sake of

funding. Inquiries into the source of funding cease to matter when a program exists that is reasonably calculated to permit ELL students to overcome their language barriers.

III. Rule 60(b)(5) Relief Was Justified Because Fundamental Changes in ELL Programming and Funding Show that Appropriate Action Was Taken.

A. The General Themes of Changed Circumstances and Program Compliance Have Not Been Challenged.

Plaintiffs make no challenge to the fundamental basis of the original 2000 order. Funding through the 1990s was rooted in inertia and this prevented NUSD from implementing its old bilingual/ESL theory of instruction because of the inability to hire specially trained teachers and the general inadequacies of other elements of ELL instruction such as insufficient instructional materials and intervention programs. Under this old program, large numbers of ELL students obtained no English language development.

Further, Plaintiffs do not challenge the effectiveness of the new SEI strategy adopted after the enactment of Proposition 203. Nor do they dispute the fact that since NUSD adopted such SEI strategies, its ELL students are now being consistently taught English for a minimum of two hours a day; the instruction takes place in small group settings; those students are taught by trained teachers who have

acquired SEI endorsements; there are plentiful instructional materials; adequate intervention programs are in place; and, most importantly, unlike 2000, a large number of NUSD's students are learning English and becoming proficient. As noted in the Superintendent's opening brief, these massive changes did not take place overnight. They were wrought through deepened involvement of the federal government under NCLB, significant structural changes at the state level, general funding increases, increased funding devoted solely to ELL purposes, and substantially better local management and use of resources. There is now a coherent system in place reasonably calculated to teach English so ELL students may overcome language barriers (hence, EEOA compliance). This is completely different from the situation in 2000 when there was a theory of bilingual/ESL language instruction, but no system to effectively implement that theory.

Though these main themes have not been controverted, Plaintiffs now claim that blemishes exist at NUSD. The District Court made ***no*** finding regarding any of these purported blemishes, did not deny relief on the basis of any of these items, and explicitly rested its decision on the funding mechanism of HB 2064. When judged in the context of the overall evidence, these items do not detract from the fact that the current ELL program complies with §1703(f).

B. Alleged Problems with NUSD's ELL Program Are Unsupported by the Record and Do Not Warrant Continued Federal Oversight.

i. The Focus on NUSD Is Proper.

Plaintiffs erroneously argue that the Superintendent's focus on Nogales is misplaced. Plaintiffs' Br. 38. "A class must be clearly defined and only members can be legally bound by settlements or judgments in the class action." *In re School Asbestos Litig.*, 56 F.3d 515, 519 (3d Cir. 1995). The District Court ordered that this action be "maintained as a class action" and "that the class shall consist of all minority at risk and limited English proficient children now or hereafter enrolled in the Nogales Unified School District." CR 105. The class was never expanded. Liability under the original 2000 order rested solely on evidence about NUSD's non-functioning bilingual/ESL program. The class never involved students from any other school district. Because the District Court looked solely at the NUSD program in making its findings in the original 2000 order, the Superintendent, in the Rule 60(b)(5) hearing, properly concentrated his evidence to show that circumstances in NUSD had changed.

The Superintendent agrees that any *remedy* would have statewide application because of the "general and uniform" provision of the Arizona Constitution. *Liability* in this case, however, is and always was measured by the ELL program at NUSD. The original 2000 order was based solely on evidence

concerning NUSD. If Plaintiffs believed that the focus of liability was to be measured by other school districts, they should have added other parties to the complaint.

ii. Reclassification Rates at NUSD Show Positive Results.

Plaintiffs now incorrectly claim that Dr. Zamudio's conclusory statement that it takes NUSD four to five years to reclassify its ELL students is a blemish and aver that A.R.S. §15-752 requires ELL students to become English proficient in one year. Plaintiffs' Br. 39. There is no Arizona statute requiring an ELL student to become proficient within any period. A.R.S. §15-752 (Proposition 203) simply suggests that ELL students be educated through SEI strategies "not normally intended to exceed one year."[3]

Moreover, there is no correlation between the pace of ELL reclassification and funding. For example, Cathy Rivera, who presided over the ELL program in the Scottsdale Unified School District, testified that it took the average Scottsdale ELL student over five years to be reclassified. CR 611 (Dep. p. 66). Yet, Scottsdale spends twice as much money on its ELL program as NUSD, groups its beginner ELL students in class size ratios of 10:1,

---

[3] HB 2064 seeks to quicken the pace of ELL proficiency and all beginning ELL students must undergo a minimum of four hours per day of English language instruction. App. 288.

and provides four hours of English language development daily to all ELL students.[4] *Id.* pp. 33, 65-66 & Ex.74.

That one school district or particular school reclassifies its students faster than another is beside the point. There are many explanations why that may be the case. The essential focus should be on whether the school district "takes appropriate action" so that ELL students can overcome their language deficiencies. On the basis of the evidence produced at the Rule 60(b)(5) hearing, NUSD took "appropriate action" when large percentages of its ELL students at all grade levels improved their English language proficiency and became English proficient. App. 312.

iii. Graduation Rates Provide No Help in Determining "Appropriate Action."

Plaintiffs cite statistics regarding graduation rates and even go outside the record to assert that the graduation rate for NUSD's ELL students is 66%. Plaintiffs' Br. 39. These statistics are meaningless. There was no link shown between graduation rates

---

[4] Scottsdale Unified School District, Tucson Unified School District, and other school districts have significantly more funding available than school districts such as NUSD because they can impose taxes under A.R.S. §15-910(G) to fund the costs of remedying any court order of the United States or agreement with the Office of Civil Rights dealing with racial discrimination.

and increased funding. There was no showing that program deficiencies caused or affected graduation rates. These statistics are no help in deciding whether "appropriate action" has been taken.

iv. ELL Students' AIMS Test Scores Are Irrelevant.

Plaintiffs incorrectly claim that performance data by ELL students on Arizona's AIMS test indicate program deficiencies. Plaintiffs' Br. 39-42. ELL students, by definition, are not proficient in English. AIMS tests are given in English. It is obvious that ELL students will not pass AIMS until they become proficient. Moreover, students' performance on standardized tests are influenced by a variety of factors beyond the control of a given school district. How well current ELL students achieve on AIMS is irrelevant to the question of "appropriate action." A more relevant question is how well reclassified (former) ELL students compare to native English speaking students on AIMS testing. That data demonstrates that NUSD's reclassified students perform just as well if not better on AIMS as native English speaking students. App. 310.

v. High School Performance Data Cited by Plaintiffs Is Misleading.

ADE conducted a study to determine how well students classified as ELL in 2003 performed on AIMS in 2005 and then ranked the schools based on their performance. Tr.Day5, p.130. The purpose of the

study was to determine what successful methods of instruction schools used, so those methods could be spread to other schools. Tr.Day5, pp.130-32; Tr.Day3, p.180. The study showed that four of the top ten schools in the state were in Nogales. No other district approached these results. Tr.Day5, pp.131-33. What was remarkable was that the pass rate at these four elementary schools on AIMS exceeded the average pass rate of 66% for all students (ELL and non-ELL) in Arizona. One school, Coronado de Vasquez, had a pass rate of 77.86%. Tr.Day5, p.134; TE214. This study caused ADE to form a task force in early 2006 to determine what strategies NUSD employed. Those successful strategies are well documented and are employed at all of NUSD's schools, including the high schools. Tr.Day5, p.133; Tr.Day3, pp.47, 50-51, TE214.

Plaintiffs seek to downplay the significance of these results by pointing out that NUSD high schools did not perform as well in the study. Plaintiffs' Br. 40. But as Dr. Zamudio pointed out during trial, older students tend to have difficulty in learning a new language and catching up academically. Tr.Day6, pp.51-53, 128. Kelt Cooper, NUSD's superintendent from 2000 to 2005, also testified that scores decrease at higher grade levels. Tr.Day4, p.55. He told the school board that his managerial reforms would therefore first provide "radical improvements" at the elementary schools and that there would be a "feeder effect," over time, at the middle and high schools. Tr.Day4, pp.55-57. He also described gangs and "endemic" drug problems at NUSD's high schools as

major factors impacting NUSD high school students' performance on AIMS. Tr.Day4, pp.59-60.

For these reasons, courts have discouraged reliance on test scores as a means of evaluating whether discrimination exists. "Using achievement test scores as a measure [of discrimination] is deeply problematic." *United States v. City of Yonkers*, 197 F.3d 41, 54 (2d Cir. 1999). "Neither the remedial obligations, this Court, nor the Supreme Court require the Defendants to guarantee success in proficiency testing; success is strongly influenced by many factors beyond the control of the school districts." *Reed v. Rhodes*, 1 F. Supp. 2d 705, 738 (N.D. Ohio 1998).

No one ever challenged the resources and strategies in place at the high schools. No one ever claimed that the high schools failed to take "appropriate action." Indeed, there was no basis for such a statement when the evidence demonstrated that significant resources and effective programs were devoted to NUSD's ELL high school students and that they, in fact, were learning English and becoming proficient. Tr.Day6, pp.21, 24, 28, 30, 54, 62; TE214; App. 312.

vi. There Are Sufficient Qualified Teachers.

Plaintiffs' claim that NUSD experiences a shortage of qualified teachers is contrary to the record. Plaintiffs' Br. 42. NUSD's teachers, on the average, are not only experienced with 8-9 years of teaching,

but 90% are highly qualified under NCLB parameters. Tr.Day6, pp.45, 105, 108. Though the remaining 10% of staff is comprised of long term substitute and emergency certified teachers, some of these teachers are perfectly qualified to teach and are on path to obtain their Arizona certification. Tr.Day6, p.104. More importantly, there was no evidence that any of these emergency and substitute teachers had any involvement with NUSD's ELL programs. Tr.Day6, p.45.

Witnesses lauded the teachers at NUSD. Irene Moreno of ADE stated that "it would be an honor to teach and work with the majority of these teachers." Tr.Day1, p.175. Rosalie Porter, a national expert on ELL issues commented that NUSD's teachers were "impressive." Kelt Cooper stated that NUSD had "very sharp" teachers and administrators. Tr.Day1, p.175; Tr.Day4, p.62.

Plaintiffs fail to focus on the appropriate issue. In 2000, NUSD suffered a systematic breakdown in its ELL programs because it could not hire bilingual/ESL endorsed teachers to teach the theory of instruction that NUSD had then adopted. But by 2007, all of NUSD's ELL students were placed in classrooms in which English language development was taught, and the state ensured, through SEI endorsements, that teachers in those classrooms were properly trained. Indeed, the District Court gave its imprimatur to these endorsements stating that they provide teachers with "the opportunity to develop the necessary skills to appropriately address ELL students'

unique needs and allow them to participate equally in their schools' instructional programs." CR 292. The Rule 60(b)(5) hearing showed that the systemic problem in finding qualified teachers no longer existed.

vii. There Is Sufficient Tutoring.

Plaintiffs further claim that "Nogales [cannot] afford additional tutors." Plaintiffs' Br. 42. Yet, NUSD failed to apply for state tutoring money provided under A.R.S. §15-809, Arizona's AIMS Intervention/Dropout Program, and only spent $8,875.00 of $31,000.00 allocated to it under A.R.S. §15-241(Q), Arizona's Underperforming/Failing School Fund. TE223, p.10; Tr.Day2, p.2. ADE's task force report noted that one of the hallmarks of success by NUSD is that it provides intervention measures to benefit ELL students during the school day, offers remedial summer school programs, and provides tutoring before, during, and after school. TE214; Tr.Day1, pp.163-69. Dr. Zamudio confirmed that these tutoring strategies contributed to the "success" of NUSD's ELL program. Tr.Day6, p.28.

viii. Teacher Aides Are Not Critical.

Plaintiffs claim a need for aides, but neglect to state that there is a professional disagreement among educators as to their efficacy. Plaintiffs' Br. 42. Under Kelt Cooper's tenure, NUSD consciously eliminated aides because they barely spoke English, some did

not even have a GED, and they inhibited teacher interaction with students. Tr.Day3, p.223; Tr.Day4, pp.11, 12, 14. Dr. Zamudio took a different view and wanted to hire aides. Tr.Day6, p.47. Zamudio, however, acknowledged that reasonable professionals differ on this issue. Tr.Day6, p.155. The most important point is that NUSD took "appropriate action" without the use of aides. The federal judiciary should not be drawn into this pedagogical debate. As long as professional judgment is used "it is not appropriate for the courts to specify which of several professionally acceptable choices should have been made." *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982).

ix. Class Sizes Are Not an Issue.

Plaintiffs assert that the average class size at NUSD remains high. Plaintiffs' Br. 42. Class size has not been a problem since Kelt Cooper commenced enforcing NUSD's attendance policies and set realistic class size goals.

Dr. Zamudio concurred. He stated that the high schools maintain class sizes at 16-17 for ELL students, that middle school ELL students separately receive "small group" instruction with intense focus on English language development, and that elementary school ELL students also receive small group instruction. Tr.Day6, pp.20-23. Nogales, like any other school district, transfers teachers from one school to another to properly balance classroom ratios. Dr. Zamudio testified that in 2007, no class

exceeded 29 and, in his words, "we are managing our classroom size well." Tr.Day6, pp.14-15.

The 2006 task force determined that every elementary school had an average class size in the low 20s except for Vasquez de Coronado with a class size of 28. One middle school's class size was 26 and the other was 31. Nogales High School achieved class sizes of 22 and the alternative high school maintained a class size of 20. These class sizes are quite reasonable. Rosalie Porter, a nationally acclaimed expert, stated that she has been in thousands of ELL classrooms throughout the country with class sizes in the 20s and excellent ELL instruction took place. Tr.Day1, pp.104-05.

Conclusions about class sizes can also be misleading. For example, Vasquez de Coronado, with an average class size of 28, posted the best test scores in NUSD, ranked third in the state, and its ELL students far exceeded the state average. TE214. ELL students at Desert Shadows Middle School, with an average class size of 31, posted scores in the top 25% of the state and substantially exceeded the other middle school at NUSD with a classroom size of 26. TE214.

Plaintiffs cannot seriously contend that the foregoing class sizes constitute "inappropriate action" when their own witness states the opposite. Instead, like the Ninth Circuit, they claim that NUSD's class sizes do not match the 15:1 ratio put forward by ADE as a suggestion to school districts. The record

disclosed the origin of this ratio as an aspirational compromise number. Tr.Day3, pp.143, 190. Even Dr. Zamudio understood this ratio to be unrealistic. Tr.Day6, p.80. Further, this "ideal" target never had any effect because it was subsumed by the class size determinations to be made by the task force created by HB 2064. Tr.Day3, p.190. Though the task force models were in the process of being created during the Rule 60(b)(5) hearing in 2007, Plaintiffs go outside the evidentiary record and refer to the completed models that now govern Arizona's ELL program. They claim that class sizes at NUSD in 2007, in certain cases, do not match the class size limits of the new task force models. This is misleading. First, this new task force model requires ELL students to be grouped by proficiency ability in classes not to exceed 23 for pre-emergent/emergent students and 28 for basic/intermediate students. Second, NUSD is in compliance with these class sizes for the current year.

Hypothetical class size targets were not the issues posed to the District Court in 2007. At that time, the issue was whether NUSD achieved reasonable class sizes so that it could deliver effective ELL programs. The evidence shows that it did.

x. All Sources of Funding Should Be Considered.

Plaintiffs claim that only earmarked funding sources should be considered. This is consistent with the Superintendent's complaint that the lower courts

treated §1703(f) as a funding statute, rather than a performance statute.

Plaintiffs claim, for example, that total override money of $1,674,000.00 should not count because NUSD internally earmarks only $43.43 per student of this money for ELL students. They then claim that the override may be temporary even though it has been in effect for every single year since the original 2000 order was entered. Plaintiffs fail to mention other sources of funding that have added hundreds of millions of dollars to public education. It is nonsense to claim that all new sources of funding should not be considered in weighing the propriety of Rule 60(b)(5) relief.[5] NUSD receives base level funding, Proposition 301 funds, override funds, and other monies. TE225, 231. Its school board has total discretion on how to use those funds. The new funding increases allowed NUSD's maintenance and operations budget to grow from $22,195,385.00 in 2000 to $28,956,939.00 in 2006 while the number of students declined. TE225. NUSD, in 2007, mounted effective ELL programs with this money and did not run afoul of any federal law.

---

[5] In fact, plaintiffs acknowledge (*see* Plaintiffs' Br. 40) that because NUSD "is composed almost entirely of ELL or reclassified-ELL students, it is difficult to draw any sharp distinction between ELL and non-ELL students." By this logic, no "sharp distinction" should be made between sources of funding for ELL and non-ELL students because all funding sources will inevitably benefit all ELL students who, according to the Plaintiffs, comprise almost the entire school district.

The rising tide of aggregate increased funding lifts all boats. When those increases permit a school district to pay higher salaries, hire more teachers, obtain plentiful instructional materials, obtain more tutoring, and lower class sizes, all students benefit, ELL and non-ELL. Plaintiffs forget that ELL students are entitled to a share of base level funds and any other funding provided by Arizona's finance system. Further, the notion that diverting base level funds has hurt NUSD's non-ELL programming has no support in the record. To the contrary, Dr. Zamudio extolled the progress of NUSD's mainstream students and noted that they are far exceeding state averages on Arizona's AIMS test. TE221.

Plaintiffs suggest that moving funding from regular education to ELL programming would be "insensitive." Even if true, that hardly constitutes a violation of federal law.[6] There is nothing in this record to indicate that the regular programming at NUSD has suffered.

xi. Program Compliance, Not Perfection, Is All that Is Required.

In determining whether a school district's education plan for ELL students constituted "appropriate action," the *Castaneda* court found that Congress

---

[6] "The commission of a federal judge is not a general assignment to go about doing good." *Toussaint v. McCarthy*, 801 F.2d 1080, 1087 (9th Cir. 1986).

intended to balance two competing interests: the desire "to leave state and local educational authorities a substantial amount of latitude in choosing programs and techniques they would use to meet their obligations under EEOA" and the need to "insure that schools made a genuine and good faith effort, consistent with local circumstances and resources, to remedy the language deficiencies of their students." 648 F.2d at 1007. But "the law does not require perfection." *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 576 F. Supp. 1503, 1518-19 (D. Colo. 1983). "Are things perfect? No, and they never will be." *Citizens v. Schafer*, 872 F. Supp. 689, 709 (D.N.D. 1995), *reversed in part*, 83 F.3d 1008 (8th Cir. 1996). What the law requires is that there be a system in place that ***reasonably*** addresses problems, imperfections, and threatened violations of federal law. *Id.*

Plaintiffs seek additional funding for program enhancements that clearly are unnecessary to redress any existing violation of federal law. Plaintiffs and the Ninth Circuit argue, for example, that the failure of NUSD to attain 15:1 ratios for its ELL students is somehow a deficiency, when there is no evidence that this type of ratio is necessary to conduct effective ELL programs.

Further, the argument of the United States that curing the deficiencies in the original 2000 order is insufficient for Rule 60(b)(5) relief is puzzling, yet symptomatic of the positions advanced in this case. United States Br. 26. Plaintiffs and the United States continue to focus on remedies when the principal

issue properly before the District Court in the Rule 60(b)(5) hearing was program compliance.

Finally, the United States asserts that the state must provide a structure under which school districts can comply with federal law. The Superintendent agrees. Indeed, the District Court complimented ADE for "creating standards, norms and oversight for Arizona's public schools and students with regard to ELL programs." App. 97. Arizona enacted a plethora of statutes that fundamentally altered Arizona's approach to ELL education. The comprehensive nature of state involvement is well documented in the evidentiary record. Thus, Arizona *has* provided an adequate structure under which school districts can comply with the EEOA. For that reason, NUSD now *is* complying with the EEOA.

The notion that to comply with the EEOA, Arizona must tell school districts how they must manage their funding and how they must staff their schools, is beyond anything envisioned by Congress. Indeed, the *Castaneda* court takes a contrary position. The Superintendent is unaware of any case stating that the EEOA requires states to micromanage school districts to ensure systematic compliance.

It was shown at the Rule 60(b)(5) hearing that Arizona instituted a broad structure to ensure effective ELL programming. That structure permitted NUSD to conduct programs that were reasonably calculated to permit ELL students to "overcome language barriers." That is "appropriate action" and all that is required under the EEOA.

xii. Program Compliance Has Been Achieved.

Every single finding in the original 2000 order was upended. In 2007, unlike 2000, there were adequate classrooms, appropriate intervention programs and tutoring, reasonably sized classrooms, plentiful instructional materials, and, most importantly, trained and endorsed teachers. On top of these major changes, ADE put into place an infrastructure of teacher training, proficiency standards, assessments, monitoring for program effectiveness, and solutions teams to provide technical assistance. This permitted NUSD, at current funding levels in 2007, to provide an effective ELL program. Every witness testified, including Plaintiffs' own witness, that the NUSD program was a success. Indeed, by 2007, unlike 2000, NUSD was providing consistent English language development and its ELL students were overcoming their language barriers in large numbers. No one has ever challenged the Superintendent's core argument that the *Castaneda* test was met because NUSD provided a program reasonably calculated to teach ELL students English so they could participate equally in their schools' academic programs. Superintendent's Opening Brief, pp. 23-30.

IV. House Bill 2064 Is Irrelevant.

The Superintendent argued at the outset of the Rule 60(b)(5) hearing that compliance with §1703(f) was achieved without considering the two-year

funding limit and the federal offsets of HB 2064. The District Court struck down those provisions and they were never implemented. That decision was upheld by the Ninth Circuit. Consequently, those provisions never had any effect on the structural changes in ELL programming that took place and were the subject of the Rule 60(b)(5) hearing. The Superintendent takes no issue with those rulings and their consideration is irrelevant to this appeal. Consequently, Plaintiffs' argument that the funding mechanisms of HB 2064 require denial of Rule 60(b)(5) relief has no merit.

V. The Parties Agree that NCLB Supplements, but Does Not Displace the EEOA.

The Superintendent has never argued that NCLB repealed or replaced §1703(f). Since the two statutes involve the same subject and pursue the same objectives, they should be read together and consistently. Both the Plaintiffs and the United States concur that NCLB supplements the EEOA. Plaintiffs' Br. 5; United States Br. 24. The parties differ in the application of these general principles to the two statutes.

Both the United States and the Plaintiffs contend that the approval of a plan by the United States Department of Education ("DOE") does not reflect any judgment about the adequacy of a state's ELL requirements. Plaintiffs' Br. 5; Unites States Br. 20. This is belied by both statute and the record. A state

must submit to DOE and institute English language proficiency standards for ELL programs statewide and those standards must be aligned to the state's academic English standards. 20 U.S.C. §6823(b)(2). These standards are massive. TE202. They provide the curricular foundation for every teacher in Arizona and allow the state and school districts to monitor and assess the progress of ELL students. Tr.Day1, p.43. When ELL students master the higher level of these standards, they are working at the same level as regular English speaking students in the 12th grade. Tr.Day1, p.39. To ensure that these standards met federal requirements, Arizona hired a nationally known expert to develop them. Tr.Day1, p.43.

NCLB also requires states to annually assess ELL students to ensure that they are meeting these proficiency standards. 20 U.S.C. §6823(b)(3)(D). Arizona initially required all school districts to use an assessment tool called the Stanford English Language Proficiency test ("SELP") because it was closely aligned to the proficiency standards. Tr.Day1, p.46. However, DOE rejected SELP and required Arizona to adopt Azella, a different assessment tool, because Azella was even more closely aligned to Arizona's proficiency standards. Tr.Day1, p.50. Contrary to the position of the United States, DOE is not an inert agency with no involvement in state programming.

Further, NCLB requires states to hold school districts accountable for the progress of their ELL students and requires specific percentages of ELL students to improve and attain proficiency on these

assessment tests so as to meet their AMAOs. 20 U.S.C. §6842. Those percentages are specifically approved by DOE. Tr.Day1, p.160. School districts must also provide detailed plans on how they will assure that their ELL students will achieve progress on their AMAOs. 20 U.S.C. §6826.

A state plan must set forth how it will establish proficiency standards tied to its academic English standards. 20 U.S.C. §6823. DOE, after using a "peer review" process, will approve the plan once it meets statutory requirements. 20 U.S.C. §6283(c).

In addition, the state must hold school districts accountable if they fail to meet their AMAOs. 20 U.S.C. §6842(b). For any school district that does not achieve its AMAOs for two years, the state must require an improvement plan and provide technical assistance. 20 U.S.C. §6842(b)(2)(3). More drastic steps will occur if such failure continues for four consecutive years. 20 U.S.C. §6842(b)(4).

Arizona has put together solutions teams to comply with NCLB and provide technical assistance to those school districts which fail to meet their AMAOs. Tr.Day5, pp.146-147; A.R.S. §15-741. Arizona also continually monitors school district ELL programs and conducts outreach programs to ensure their effectiveness. TE207, TE209. It is true that NCLB specifically gives states and school districts "flexibility" on how best to implement strategies for the teaching of English. 20 U.S.C. §6812(9). This is consistent with *Castaneda*, which determined that

§1703(f) provided states and local agencies with "wide latitude" in implementing ELL programs. However, NCLB constitutes a fully integrated system to ensure that ELL students become proficient.

No one has ever suggested that Arizona's plan and the implementation of that plan fail to comply with either the intent or purpose of NCLB. No one, for example, has indicated that its proficiency standards are not tied to its academic standards. Nor has anyone suggested that Arizona's AMAOs and the target percentage for both improvement and attainment of English proficiency are improper.

In short, Arizona has put together a coherent and integrated system required under NCLB to ensure that its ELL students learn English, become proficient, and do so in lockstep with Arizona's academic standards. It holds school districts accountable for the progress of their ELL students. As a result, NUSD's students, in large number and across the grade spectrum, are now learning English and becoming proficient. It is inconsistent to claim that Arizona is in *systemic violation* of the EEOA (requiring only "appropriate action") when it is clear that Arizona has achieved *systemic compliance* with NCLB.

A. That State Compliance with NCLB Is Voluntary Has No Bearing on the Need to Interpret the EEOA Consistently with It.

The fact that NCLB is voluntary does not affect the requirement that, in exchange for funding, a state must adhere to the accountability requirements of NCLB. Once those requirements have been met and systemic and coherent programs are employed, it matters not whether NCLB is voluntary or mandatory. Further, the Superintendent has never argued that NCLB displaces the private right of action provided for in the EEOA. He urges, instead, that EEOA still can be used to redress *individual* acts of discrimination. But the State should not be liable for a *systemic* violation of the EEOA when it puts into place comprehensive programs approved by DOE and that meet the purposes of NCLB.

B. NCLB, like the EEOA, Requires Positive Results.

Plaintiffs finally argue that the EEOA requires inputs and NCLB does not and that this somehow justifies a departure in the way each statute is interpreted. That is not accurate. NCLB requires proficiency standards, assessments, qualified teachers, testing, and results. Though NCLB does not specifically tell school districts what language theory should be used, what class sizes are appropriate, or how many hours of English language development should be taught, neither does the EEOA under the

Castaneda test. However, "appropriate action" under the EEOA must be undertaken to obtain positive results. Much like the EEOA, NCLB concentrates primarily on positive results. If positive results cannot be obtained under a state plan because a state fails to dedicate appropriate resources, then the DOE is empowered under NCLB to impose appropriate sanctions. However, in 2007, no one suggested that Arizona had not provided resources adequate to implement its plan so as to ensure that its ELL population had real opportunities to learn English. Indeed, the opposite was shown when NUSD's AMAOs demonstrated the overwhelming success of its ELL programs.

CONCLUSION

Compliance with the "appropriate action" requirement here may be determined as a matter of law. Every witness testified that NUSD conducts an effective ELL program and the District Court never made a finding to the contrary. A requirement of state earmarked funding does not appear in §1703(f). The judgments of the District Court and the Ninth Circuit should be reversed.

Respectfully submitted,

ERIC J. BISTROW,
Counsel of Record
DARYL MANHART
MICHAEL S. DULBERG
MELISSA G. IYER
BURCH & CRACCHIOLO, P.A.
702 E. Osborn, Suite 200
Phoenix, Arizona 85014
phone: 602-274-7611
fax: 602-234-0341

Attorneys for
Petitioner Superintendent

April 10, 2009

APPENDIX A

[SEAL]

STATE OF ARIZONA

JANICE K. BREWER
GOVERNOR

EXECUTIVE OFFICE

March 11, 2009

The Honorable Terry Goddard
Arizona Attorney General
1275 West Washington
Phoenix, Arizona 85007

RE: *Flores v. State of Arizona*, Nos. 08-289 and 08-294

Dear Mr. Goddard:

Your office represents the State of Arizona in *Flores v. Arizona*. It is my understanding that your office has acted at the behest of my predecessor throughout the course of this litigation. I therefore write to clearly establish the position of the State of Arizona in these cases currently pending before the United States Supreme Court.

After carefully reviewing the above cases and the issues currently before the Court, I hereby direct you to file a brief at the Court on behalf of the State of Arizona adopting and joining in the positions taken by the Superintendent of Public Instruction, the Speaker of the Arizona House of Representatives, and the President of the Arizona Senate.

Further, you are directed to take any and all actions on behalf of the State of Arizona necessary to aid, facilitate and support the positions taken by the Superintendent, the Speaker, and the President in these cases before the Court.

Sincerely,

/s/ Janice K. Brewer
Janice K. Brewer
Governor

cc: The Honorable Thomas C. Horne
The Honorable Bob Burns
The Honorable Kirk Adams

JKB/jk

REPLY BRIEF

125

(30)

(29)

FILED
APR 13 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 08-294
(consolidated with No. 08-289)

In the
Supreme Court of the United States

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES and PRESIDENT OF THE ARIZONA SENATE,

PETITIONERS,

v.

MIRIAM FLORES, individually and as parent of Miriam Flores, minor child; ROSA RZESLAWSKI, individually and as parent of Mario Rzeslawski, minor child; STATE OF ARIZONA and the ARIZONA STATE BOARD OF EDUCATION, and its members in their official capacities,

RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

RICK RICHMOND
CHRISTOPHER C. CHIOU
STEVEN A. HASKINS
KYLE T. CUTTS
KIRKLAND & ELLIS LLP
777 South Figueroa Street
Los Angeles, CA 90017
(213) 680-8400

DAVID J. CANTELME
D. AARON BROWN
PAUL R. NEIL
CANTELME & BROWN, PLC
3030 N. Central Avenue
Phoenix, AZ 85012
(602) 200-0104

KENNETH W. STARR
Counsel of Record
KIRKLAND & ELLIS LLP
777 South Figueroa Street
Los Angeles, CA 90017
(213) 680-8400

ASHLEY C. PARRISH
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Counsel for Petitioners

April 13, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

MITH

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 1

I. The Legislature Has Standing To Protect Its Legislative Prerogatives. 1

II. The Ninth Circuit Misapplied The Rule 60(b) Standard 4

A. The Ninth Circuit's Decision Violates This Court's Precedents. 5

B. Arizona Has Satisfied The "Flexible" Standard Under Rule 60(b). 11

1. Changes In Fact Require Reassessing The Injunction. 12

2. Changes In Law Require Reassessing The Injunction. 18

3. HB 2064 Poses No Impediment To Rule 60(b) Relief. 24

III. The Court Should Direct The Restoration Of Local Control Over Arizona's Schools 26

CONCLUSION 28

TABLE OF AUTHORITIES

Page(s)

Cases

Allen v. McCurry,
449 U.S. 90 (1980) 9

Board of Educ v. Dowell,
498 U.S. 237 (1991) 11

Castaneda v. Pickard,
648 F.2d 989 (5th Cir. 1981) 14, 23, 24

Coleman v. Miller,
307 U.S. 433 (1939) 2

Connecticut v. Spellings,
453 F. Supp. 2d 161 (D. Conn. 2006) 20, 26

Evans v. City of Chicago,
10 F.3d 474 (7th Cir. 1993) 11

Forty-Seventh Legislature v. Napolitano,
213 Ariz. 482 (2006) 3

Frew v. Hawkins,
540 U.S. 431 (2004) 6, 8, 9, 11

General Motors Corp. v. EPA,
363 F.3d 442 (D.C. Cir. 2004) 26

Glover v. Johnson,
138 F.3d 229 (6th Cir. 1998) 11

Gonzalez v. Crosby,
545 U.S. 524 (2005) 7

Hodel v. Virginia Surface Mining & Reclamation Ass'n,
452 U.S. 264 (1981) 4

HUD v. Rucker,
535 U.S. 125 (2002) 22

Karcher v. May,
484 U.S. 72 (1987) 2

Kokkonen v. Guardian Life Ins. Co.,
511 U.S. 375 (1994) 26

Lewis v. Casey,
518 U.S. 343 (1996) 23

Lujan v. National Wildlife Fed'n,
497 U.S. 871 (1990) 23

Miller v. French,
530 U.S. 327 (2000) 7

Missouri v. Jenkins,
515 U.S. 70 (1995) 11

Morse-Starrett Prods. Co. v. Steccone,
205 F.2d 244 (9th Cir. 1953) 6

New York v. United States,
505 U.S. 144 (1992) 9

Proctor v. Hunt,
43 Ariz. 198 (1934) 2

Railway Employees v. Wright,
364 U.S. 642 (1961) 4

Roosevelt Elem. Sch. Dist. No. 66 v. Bishop,
179 Ariz. 233 (1994) 17

Rufo v. Inmates of Suffolk County Jail,
502 U.S. 367 (1992) 4, 6, 8, 9, 11

Schildhaus v. Moe,
335 F.2d 529 (2d Cir. 1964) 6

Sixty-Seventh Minnesota State Senate v. Beens,
406 U.S. 187 (1972) 3

Stanley v. Darlington County Sch. Dist.,
84 F.3d 707 (4th Cir. 1996) 4

State ex rel. Woods v. Block,
189 Ariz. 269 (1997) 2

Tachiona v. United States,
386 F.3d 205 (2d Cir. 2004) 3

United States v. Swift & Co.,
286 U.S. 106 (1932) 5, 6, 7, 10, 11

United States v. United Shoe Mach. Corp.,
391 U.S. 244 (1968) 10

Valley Forge Christian College v. Americans United for Separation of Church and State,
454 U.S. 464 (1982) 22

Yes on Prop 200 v. Napolitano,
215 Ariz. 458 (Ct. App. 2007) 9

Statutes and Regulations

20 U.S.C. § 1702(a) 22

20 U.S.C. § 1703(f) 13

20 U.S.C. § 1712 ..... 21, 22

20 U.S.C. § 1713(g) 21

20 U.S.C. § 1720(a) 21

20 U.S.C. § 6302 26

20 U.S.C. § 6801 26

20 U.S.C. § 6812(2) 20

20 U.S.C. § 6847 21

34 C.F.R. § 299.10(b) 20

Ariz. Rev. Stat. § 15-756.11(G) 25

Other Authorities

GARNER, BRYAN A.,
A DICTIONARY OF MODERN AMERICAN USAGE... 21

Vander Ark, Tom,
America's High School Crisis: Policy Reforms That Will Make a Difference,
EDUCATION WEEK, Apr. 2, 2003..... 15

WRIGHT, MILLER, & KANE,
FEDERAL PRACTICE & PROCEDURE § 2863
(2d ed. 1995) 6, 7

INTRODUCTION

Respondents and their *amici* attempt to defend the lower courts' decisions, but in the end confirm that the federal judiciary has enmeshed itself in highly politicized debates about educational policy. That intrusion should end.

In the eight years since the district court's injunction was entered, a sea change has occurred in state and national educational policies. Significant changes have also indisputably occurred in Nogales's school system. The upshot is that the district court's injunction is no longer needed, as there is no continuing violation of federal law. The injunction should be vacated, and this Court should direct the restoration of local control over Arizona's schools.

ARGUMENT

I. The Legislature Has Standing To Protect Its Legislative Prerogatives.

Respondents half-heartedly suggest that the Legislature "may" lack standing. Flores Br. 22. Jettisoning the argument they pressed below—that the President and Speaker are purportedly not representing the Legislature as a whole—Respondents opine that the Legislature should not participate in this case because the Arizona Constitution "bars the legislature from exercising an executive function." *Id.* at 21-22. The suggestion is misguided.

1. The Legislature's participation in this litigation in no wise intrudes on the Arizona

executive branch's authority. The Legislature did not spontaneously decide to join this case. Instead, it was effectively compelled to appear to *defend* its institutional interests in response to a judicial order commanding it to enact legislation on threat of multi-million-dollar fines. *See* Pet. App. 173a ("it is ordered that the legislature has 15 calendar days ... to comply"); *id.* (if "the State has not complied by the end of the 2006 legislative session a $2 million dollar per day fine will be imposed"). With no party before the court adequately representing its interests, the Legislature was entitled to intervene to protect its prerogatives.

The district court's injunction is causing the Legislature concrete and particularized injury because it invades the Legislature's "plenary power over the expenditures of public money." *Proctor v. Hunt*, 43 Ariz. 198, 201 (1934). It is precisely for this reason that the Legislature formally appointed the Speaker and the President to "represent [its] interests ... in this case" and to take action "on behalf of the Legislature as a whole." JA 81, 84. In these circumstances, the Legislature has standing to protect its institutional interests, preserve its members' votes, and defend the integrity of the democratic process. *See Coleman v. Miller*, 307 U.S. 433, 438 (1939); *Karcher v. May*, 484 U.S. 72, 81-82 (1987).

2. Contrary to Respondents' intimations, nothing in Arizona law obliterates the Legislature's right to defend its institutional prerogatives. Respondents rely on *State ex rel. Woods v. Block*, 189 Ariz. 269 (1997), but that inapposite case addressed whether the Legislature could create a

council to conduct general litigation on behalf of the State. Other Arizona authorities make clear that, when acting as a whole, the Legislature has standing to challenge actions by other branches of state government that result in "direct institutional injury." *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 486-87 (2006) (Legislature has standing to challenge Governor's item veto inflicting institutional injury). That conclusion is consistent with this Court's precedents, holding that a legislature has standing to appeal when its powers or duties are "directly affected" by a judicial decree. *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 194-95 (1972).

3. Respondents nonetheless suggest that the Legislature is putting this Court in the "uncomfortable position" of "mediating" disputes "between state officials." Flores Br. 22. That suggestion comes with ill grace. It is the lower courts' actions, not the Legislature's response, that has spawned this state of affairs. The problem here is that a federal court improperly permitted its powers to be employed at the behest of one set of state officials to the detriment of another. There is nothing "uncomfortable" about this Court canceling out a lower federal court's invasion of a State's constitutional prerogatives. In this case, as in many others, parties are merely seeking this Court's review to determine whether the lower courts "overstepped [their] bounds," a "kind of review" that "is the standard grist of appellate courts." *Tachiona v. United States*, 386 F.3d 205, 213 (2d Cir. 2004).

As the numerous *amici* briefs attest, the district court's injunction has enmeshed the federal judiciary in hotly disputed questions of local educational policy. The lower courts' attempt to commandeer the State's legislative process to ensure victory for one side of that debate stretches the limits of judicial authority. *See Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981) (the federal government may not "commandeer[] the legislative processes of the States"). As the Fourth Circuit has recognized, it is "an unfathomable intrusion into a state's affairs—and a violation of the most basic notions of federalism—for a federal court to determine the allocation of a state's financial resources." *Stanley v. Darlington County Sch. Dist.*, 84 F.3d 707, 716 (4th Cir. 1996). Precisely because the "legislative debate over such allocation is uniquely an exercise of state sovereignty," *id.*, a legislature has standing to be heard when its spending power is commandeered by a federal court.

II. The Ninth Circuit Misapplied The Rule 60(b) Standard.

Because the district court's injunction reflects an "unfathomable intrusion" into the State's legislative prerogatives, the lower courts should have stood ready, in the exercise of "sound judicial discretion," to modify the injunction when circumstances changed. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 380 (1992) (quoting *Railway Employees v. Wright*, 364 U.S. 642, 647 (1961)). The Ninth Circuit instead applied a legally incorrect and unduly rigid Rule 60(b) standard. Respondents and the Solicitor General attempt to

defend the lower court, but their approach only underscores the Ninth Circuit's error by resurrecting the long-superseded standard from *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932).

A. The Ninth Circuit's Decision Violates This Court's Precedents.

Respondents and the Solicitor General contend that the Ninth Circuit properly applied this Court's precedents and "made no mention" of *Swift*'s "grievous wrong" standard. *See* U.S. Br. 17; Flores Br. 46. To be sure, the Ninth Circuit cloaked its decision with unexceptional citations to relevant precedent and soothing references to a "flexible" standard. But beneath this ornamental layer, the Ninth Circuit's decision substantively departs from this Court's precedents in three fundamental respects. *See* Pet. Br. 37-44.

1. The Ninth Circuit refused to modify the injunction absent a showing that the legal or factual "landscape" had "*radically* changed." Pet. App. 72a (emphasis added). According to the Ninth Circuit, an injunction should not be modified except "in instances, *likely rare*, in which a prior judgment is *so undermined* by later circumstances as to render its continued enforcement inequitable." Pet. App. 60a (emphasis added). The lower court imposed this heavy burden because, as it repeatedly emphasized, the time for appeal had passed and, therefore, in its view, the "interest in finality must be given great weight." Pet. App. 51a; *see also id.* at 62a (district court's legal determinations were "unappealed and are now

final"); *id.* at 68a (refusing to "reopen matters made final").

a. The substantive burden the Ninth Circuit imposed on the Legislature was wrong as a matter of law. The lower court's approach revived in substance the superseded *Swift* standard. The requirement that circumstances "radically change," is a variation on *Swift*'s theme that changes must be "new and unforeseen." *Swift*, 286 U.S. at 119. Similarly, the admonishment that modifications to an injunction are justified only in "rare" circumstances when a judgment is "so undermined" by changed circumstances, tracks *Swift*'s rule that changes must be "so important" that "dangers, once substantial, have become attenuated to a shadow." *Id.*

Any lingering doubt that the Ninth Circuit applied the wrong standard is resolved by Respondents' own arguments. Respondents concede that *Swift* does not apply in the context of institutional reform litigation. But what they usher out the front door they seek to smuggle through the back. Citing Wright & Miller's 1995 treatise, Respondents argue that a party seeking Rule 60(b) relief may not challenge the legal or factual premises of an underlying judgment. *See* Flores Br. 30; U.S. Br. 17. But the treatise relies on cases that pre-date this Court's landmark decisions in *Rufo* and *Frew*. *See* 11 WRIGHT, MILLER, & KANE, FEDERAL PRACTICE & PROCEDURE § 2863, at 340-41 nn.18-22 (2d ed. 1995) (citing *Schildhaus v. Moe*, 335 F.2d 529 (2d Cir. 1964); *Morse-Starrett Prods. Co. v. Steccone*, 205 F.2d 244 (9th Cir. 1953)). Indeed, the treatise passages on

which Respondents rely are built around the following block quote drawn from *Swift*:

> We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting.

Id. at 341 (quoting *Swift*, 285 U.S. at 119).

b. The law has dramatically moved in the decades since Respondents' key precedents were decided. More recently, this Court has held that judicial policies favoring finality are substantially diminished by Rule 60(b), "a provision whose whole purpose is to make an exception to finality." *Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005) (interpreting Rule 60(b)(6)). To be sure, the Legislature does not seek to revisit the district court's initial judgment that, in 2000, Arizona's educational agencies were not taking "appropriate action." But that does not mean the remedy crafted by the court eight years ago is carved in stone. Modifying a continuing injunction in light of changed circumstances does not impermissibly reopen a final judgment; rather, it faithfully implements that judgment. *See Miller v. French*, 530 U.S. 327, 344-45 (2000).

This Court has unanimously recognized that finality considerations carry little weight in cases where a federal court enjoins state public officials.

See Frew v. Hawkins, 540 U.S. 431, 441 (2004). Federal courts are obliged to remain vigilant not to maintain a status quo that unnecessarily invades local prerogatives. Even if the "basic obligations of federal law ... remain the same," the "precise manner of their discharge may not." *Frew*, 540 U.S. at 442. If there is a reason to modify an injunction, a "court should make the necessary changes." *Id.*

2. Not only did the Ninth Circuit apply the wrong standard, it focused on the wrong considerations. Specifically, the Ninth Circuit gave unwarranted weight to the former Governor's failure to appeal and her "wish" that the injunction "remain in place." Pet. App. 52a. In fact, the failure of certain named defendants to appeal is a centerpiece of the Ninth Circuit's analysis, a point it repeated no fewer than ten times. *See* Pet. App. 15a, 50a, 51a n.31, 59a, 60a, 62a, 68a, 69a, 70a n.41, 72a, 91a. Picking up the lower court's mantra, Respondents and the Solicitor General trumpet this same procedural tack. *See* Flores Br. 7,8, 10, 22, 24-26, 30, 33, 38; U.S. Br. 11, 13-15, 17-18.

a. Whether the named defendants appealed or otherwise consented to the district court's injunctive remedy plays no role in a proper Rule 60(b) analysis. *See* WLF Br. 10-15 (discussing history behind this rule). Precisely because a judicial decree risks undermining "the sovereign interests and accountability of state governments," *Frew*, 540 U.S. at 441, a court must "keep the broader public interest in mind" when considering requests to modify an injunction. *See Rufo*, 502

U.S. at 392. As this Court has emphasized, even a formal *consent* decree is open to modification, because to "refuse modification" is to "bind all future officers of the State, regardless of their view of the necessity of relief." *Id.* at 392; *see also* ALEC Br. 11-14. A State "depends upon successor officials, both appointed and elected, to bring new insights and solutions to problems of allocating revenues and resources." *Frew*, 540 U.S. at 442.

b. Respondents and the Solicitor General offer no meaningful rejoinder to this fundamental principle. Their only response is the commonplace that public officials presumptively act in good faith. *See* Flores Br. 33 n.7. True (perhaps), but irrelevant. However benign officialdom's intent, the point remains that a "departure from the constitutional plan cannot be ratified by the 'consent' of state officials." *New York v. United States*, 505 U.S. 144, 182 (1992).

In any event, the record and the repeated failures to appeal demonstrate that the Legislature's interests were not adequately represented by the named defendants and, therefore, their consent is unavailing. *See Allen v. McCurry*, 449 U.S. 90, 95 (1980). As if to underscore this point, the political maneuvering long infecting this litigation continues unabated. Under Arizona law, the Attorney General has no common law powers; indeed, as Respondents recognize, the Governor directs litigation on behalf of the executive branch. *See* Flores Br. 22; *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 470 (Ct. App. 2007) (the Governor is "the highest executive voice within this state and [may] not be ignored by a

lesser officer of the executive branch"). Nonetheless, in the face of a gubernatorial order to the contrary, the Attorney General has filed a brief that purports to represent the interests of the State of Arizona. *See* Addendum ("Add.") 2-7.

Because the Governor wants control over Arizona's schools returned to the people, *see* Add. 5, the Attorney General's brief does not represent the State's official position. But the abiding point is that no weight should be given to the "consent" of public officials circa the year 2000.

3. Like the Ninth Circuit, Respondents contend that it is not appropriate to "revisit the basic legal premises of the court's earlier orders." Flores Br. 18, 32; Pet. App. 63a (refusing to revisit "basic premises" of district court's "original rulings"). In Respondents' view, a continuing injunction may not be modified until *it* is "fully satisfied." Flores Br. 31; *id.* at 32 (requiring "full satisfaction of the judgment"); U.S. Br. 28-30 (petitioners must demonstrate "full compliance" with the district court's judgment).

This focus on a court's historical interpretation of the law—as opposed to the correct terms of the law itself—again harks back to the superseded *Swift* standard. In particular, it tracks *Swift*'s teaching that a decree "may not be changed ... if the purposes of the litigation *as incorporated in the decree* ... have not been fully achieved." *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 248 (1968) (emphasis added) (describing *Swift*). In the context of modern institutional reform litigation, however, this Court has made clear—even in the context of constitutional violations—

that an injunction exceeds "appropriate limits" if it is "aimed at eliminating a condition that does not violate" federal law or "flow from such violation." *Board of Educ. v. Dowell*, 498 U.S. 237, 247 (1991). A continuing injunction may be enforced only if there is a substantial continuing violation of federal law, not simply a continuing violation of the injunction itself. *See id.*; *Evans v. City of Chicago*, 10 F.3d 474, 477-80 (7th Cir. 1993). The point is elementary: if local officials "can demonstrate that they have remedied the constitutional violations ..., *even without compliance with the details of previous orders or plans*, they must be permitted to do so" and "federal-court oversight must terminate." *Glover v. Johnson*, 138 F.3d 229, 243 (6th Cir. 1998) (emphasis added); *Missouri v. Jenkins*, 515 U.S. 70, 88-89 (1995)).

B. Arizona Has Satisfied The "Flexible" Standard Under Rule 60(b).

In contrast to *Swift*'s focus on finality considerations and the achievement of a decree's purposes, this Court's more recent decisions make clear that courts confronted with Rule 60(b) motions should focus on their proper judicial role and whether state officials have achieved the underlying purposes of the law. Had the district court applied the "flexible," law-focused standard mandated by *Rufo* and *Frew*, it would have recognized that, in light of significant changes in law and fact, its injunction has come to undermine federal law instead of implementing it.

1. Changes In Fact Require Reassessing The Injunction.

Dramatic changes have occurred in Nogales's schools since the 2000 injunction was entered, and Nogales is now conducting effective ELL programs. *See* Pet. Br. 45-50.

1. Respondents cannot dispute that Arizona voters jettisoned the old bilingual system when, in passing Proposition 203, they required a new system of structured-English-immersion. *See* Pet. Br. 19. Respondents also cannot dispute that, in restructuring its teaching methodology, Arizona has implemented new statewide programs, curricula, and protocols to enhance ELL instruction. *See id.* at 19-21. Respondents likewise do not dispute that experienced educators, including Respondents' own key witness, testified that Nogales is conducting effective ELL programs and providing appropriate ELL instruction. *See* JA 146, 192. Nor do they dispute that the improvements in Nogales's ELL programs are reflected in measurable results. *See* Pet. App. 363a-366a (NUSD placed four schools within the top ten for student performance in 2005); JA 336-338 (NUSD students exhibited superior performance at nearly every grade level). And they offer no rejoinder to evidence that Nogales's programs are successfully preparing ELL students for mainstream classrooms. *See* Pet. Br. 24, 44-50. In fact, reclassified ELL students are not only competitive with—but in some instances outperform—native English-speaking students. *See* JA 191.

Respondents reach out to the Ninth Circuit's own assessment of the record facts. But they are unable to point to a single factual finding establishing that Nogales's schools are presently failing to conduct effective ELL programs. *See* Pet. App. 102a-116a (listing findings of fact and conclusions of law). This absence of relevant findings is not surprising given the injunction's solitary focus on funding. As the Ninth Circuit itself recognized, this case has "been about ... funding since 2000." Pet. App. 69a. Adequate funding was the "only" contested EEOA issue "decided by the court" because the "rest of the EEOA violations originally alleged" were "covered by a consent decree." Pet. App. 10a (emphasis added). As Respondents conceded, the "only unresolved dispute has been the State's failure to provide school districts with adequate funding to cover the costs of the required programs." Cert. Opp. 28.

Respondents now attempt to backpedal from their concession. *See* Flores Br. 28. But the Solicitor General candidly admits that the "*only steps*" remaining to comply with the EEOA are for Arizona school districts to complete the ministerial task of submitting budget forms and "*for the legislature to appropriate funds.*" U.S. Br. 32 (emphasis added). That telling statement misconceives the statutory mandate. The EEOA requires state and local educational agencies to take "appropriate action to overcome language barriers." 20 U.S.C. § 1703(f). It imposes no obligation on the legislative branch to appropriate specific levels of funding. To the contrary,

Congress "intended to insure that schools made a genuine and good faith effort, consistent with local circumstances and resources, to remedy the language deficiencies of their students." *Castaneda v. Pickard*, 648 F.2d 989, 1009 (5th Cir. 1981).

2. Attempting to justify the funding decree, Respondents paint a gloomy picture of Nogales's schools. Their pessimism is misplaced. In particular, none of Respondents' contentions establish that Nogales's schools are failing to undertake "a genuine and good faith effort" to provide ELL students with equal educational opportunities. *Id.* And that is what the EEOA requires.

a. Respondents first contend that ELL students in Nogales's high schools perform far worse than their younger counterparts. *See* Flores Br. 39-41. But when extending its injunction, the district court made no findings regarding Nogales's high schools, let alone determined that any performance issue at the high-school level resulted from failure to take "appropriate action." There is a reason for this. The prevailing "trend [] from elementary to middle to high schools is for performance to decline" at higher grade levels for *all* students. Add. 10. In addition, "[m]ost of the research that's ever been done proves younger children starting at age four or five are most easily capable of learning a second language," and that older students "going through adolescence are not as readily willing to speak a different language in class and make mistakes." Add. 8-9, 18. Moreover, Nogales's high schools are burdened by episodic gang problems and endemic drug abuse. Pet. App. 116a. The

challenges faced by Nogales's high schools are indeed unfortunate, but they are characteristic of similar challenges around the country. *See* Tom Vander Ark, *America's High School Crisis: Policy Reforms That Will Make a Difference*, EDUCATION WEEK, Apr. 2, 2003, at 41 (high schools are the "least effective part of the American education system").

b. Respondents next assert that "significant programmatic deficiencies" remain in Nogales. Flores Br. 42. But, here again, no district court findings support this assertion. Nor is there any evidence linking these alleged deficiencies to the effectiveness of Nogales's ELL programs. Instead, the purported deficiencies serve to underscore the problems of judicial second-guessing.

Respondents suggest, for example, that Nogales cannot afford teacher aides, which they say are "essential" to ELL program success. *See* Flores. Br. 42. Yet Nogales's highly regarded former Superintendent, Kelt Cooper, eliminated teacher aides in order to improve ELL education. *See* Add. 11-14 (explaining reasons for eliminating aides). Similarly, although Respondents complain that Nogales struggles to hire qualified ELL teachers, Superintendent Cooper testified that these challenges are "no different than any other district in the United States trying to get some of the best teachers possible." Pet. App. 121a. No district court findings are to the contrary.

c. Respondents' third contention is that, even in the face of unrefuted evidence that Nogales is conducting effective ELL programs, Nogales's schools still lack sufficient funds. Respondents

assert that Arizona is required to provide ELL-specific funding to cover the "actual costs of all elements of ELL instruction" on a state-wide basis. But the requirement that ELL instruction be funded entirely by earmarked funding is a wholecloth creation of the Ninth Circuit. The fact that Arizona has chosen to provide every school district a guaranteed minimum amount of ELL-specific funding, in addition to substantial other sources of funding available for ELL instruction, should be celebrated not condemned. There is no evidence—or district court findings—that the total amount of funds available to Arizona's schools are insufficient to ensure that ELL students receive equal educational opportunities. *See* Pet. App. 177a-178a. Any failure of funding to reach specific ELL students can and should be resolved on a case-by-case basis, not through an intrusive state-wide injunction.

That the guaranteed amount of earmarked funding is arguably insufficient to cover all costs of providing ELL instruction in every Arizona school district is hardly surprising. The reality is that educational costs vary widely from school to school and district to district. It is for this reason that the suggestion, supported by the Attorney General, that Arizona should have relied on state-wide studies to determine the "actual cost" of educating ELL students is just a guise for demanding dramatic increases in funding. These sorts of costs studies are unreliable. There is no magical "actual cost" for educating ELL students that can be divined without making contentious policy judgments about complex, interrelated educational

issues. It is impossible to determine on a blanket, state-wide basis whether individual schools need more funds or should be making more efficient use of funds already available.

Contrary to Respondents' assertions, there is no obligation that the Legislature adopt a one-size-fits-all funding scheme for ELL instruction. Respondents conjure up this obligation by arguing that state law prohibits "substantial disparities" between districts in meeting "basic educational standards." Flores Br. 45-46. But the district court never determined that Nogales (or any other school district) lacks sufficient base-level funding to meet basic educational standards and conduct appropriate ELL programs. Any suggestion to the contrary is pure speculation regarding hypothetical scenarios not reflected on this record. *See id.* at 45 (imagining hypothetical situation where employing base-level funding for ELL instruction would prevent districts from meeting basic educational obligations). Nor is there anything in state law preventing local schools from taking appropriate action to address their own local circumstances. "Disparities caused by local control do not run afoul of the state constitution." *Roosevelt Elem. Sch. Dist. No. 66 v. Bishop*, 179 Ariz. 233, 242 (1994).

Finally, Respondents contend that base-level funding is inadequate because Nogales "drew on base-level state funding to support its ELL programs at the time of the initial 2000 judgment." Flores Br. 44. But that suggestion ignores the Legislature's fundamental point: circumstances have changed. By adopting structured-English-immersion, Nogales's schools have dramatically

improved precisely because they have implemented programs and processes to encourage accountability. In this regard, Superintendent Cooper's testimony is devastating to Respondents' constant spend-more-money refrain. He testified without hesitation that, absent the structural changes that he imposed, "additional money" from the Legislature would "have made [no] difference to the[] students" in Nogales. Add. 15. There are no district court findings to the contrary.

2. Changes In Law Require Reassessing The Injunction.

Significant changes in the operative legal framework have rendered the lower court's funding mandates at war with newly-fashioned federal policies.

1. Respondents and their *amici* expend considerable energy assailing an argument the Legislature has not advanced. They characterize the Legislature as contending that NCLB "entirely displace[s]" the EEOA's requirements. Flores Br. 54; *id.* at 48, 53 (compliance with NCLB "automatically satisfies" the EEOA's mandate). The Solicitor General likewise contends that nothing in NCLB "indicates an intent to displace entirely the EEOA" and that receipt of federal funding under NCLB is not a "complete defense to liability under the EEOA." U.S. Br. 24. Respondents argue that, because NCLB and the EEOA do not completely overlap, the EEOA may be employed to remedy deficiencies not addressed in NCLB.

Those contentions may or may not be true in some other case involving individualized EEOA violations. But this case concerns a sweeping judicially-crafted remedy that operates state wide to address a purported deficiency limited to funding. The question is not whether NCLB displaces the EEOA in every context, but whether it informs the meaning of "appropriate action" in this one.

The whole purpose of NCLB is to ensure equal educational opportunities through a reticulated administrative scheme that preserves flexibility for local educators by requiring States to develop state-wide plans for educating ELL students that must be approved by the Department of Education. *See* Pet. Br. 11-16, 57-64. NCLB's detailed requirements set a baseline for defining "appropriate action" at the state level. Once a state educational plan has been approved by the Department of Education, a federal court should not wield the EEOA's opened-ended requirements to order the State to develop a different "educationally sound and administratively feasible plan" requiring increases in state-wide funding. 20 U.S.C. § 1713(g). State-wide funding mandates imposed under the EEOA will inevitably undermine the flexibility and accountability that NCLB is designed to foster.

2. Respondents and the Solicitor General complain that the EEOA and NCLB have different enforcement schemes; that NCLB gives States too much flexibility; and that Department of Education oversight is not meaningful. *See* Flores Br. 52-60; U.S. Br. 21-24. These assertions boil down to a

disagreement with the congressional policies embodied in NCLB, and reflect the view that courts are free to strike a different regulatory balance than Congress.

In any event, Respondents' and the Solicitor General's assertions are misleading. NCLB was not, as Respondents suggest, merely designed to place conditions on federal funding. *See* Flores Br. 50. To the contrary, when a State adopts a plan under NCLB, it must provide adequate assurances that all ELL students receive assistance "to achieve at high levels in the core academic subjects so that those children can meet the same ... standards as all children are expected to meet." 20 U.S.C. § 6812(2). That plan must be submitted to the Department of Education, which has authority to reject the plan for failing to satisfy NCLB's requirements. *See Connecticut v. Spellings*, 453 F. Supp. 2d 161, 164-65 (D. Conn. 2006). Although NCLB creates no private right of action, its lack of judicial remedies underscores that Congress intended to limit judicial intrusions into local educational prerogatives. Contrary to the Solicitor General's suggestion, available administrative remedies are not fictional. At least twenty-four States, including Arizona, have adopted complaint procedures that permit individuals to submit Title III NCLB grievances to the Department of Education. *See* Add. 19. The regulation cited by the Solicitor General is a vestige of the pre-NCLB era; its outdated provisions do not even correspond with NCLB's titles and subparts. *See* U.S. Br. 23 n.5 (citing 34 C.F.R. § 299.10(b)).

3. Respondents and the Solicitor General argue that interpreting NCLB as informing the EEOA's "appropriate action" requirement would run afoul of NCLB's savings clause. *See* U.S. Br. 23 (citing 20 U.S.C. § 6847). Not so. The EEOA expressly delimits courts' authority to "impose only such remedies as are *essential* to correct *particular* denials of equal educational opportunity." 20 U.S.C. § 1712 (emphasis added). Although an EEOA suit may be mounted against either a local or state educational agency, *see id.* § 1720(a), nothing in the statute suggests that courts may grant remedies beyond those "essential" to correct "*particular* denials" of equal educational opportunity. *Id.* § 1712 (emphasis added). Moreover, the EEOA identifies a "priority of remedies" and requires courts to make "specific findings on the efficacy" of its chosen remedy. The most drastic remedy permitted is "the development and implementation" of an "educationally sound and administratively feasible" plan. *Id.* § 1713(g).

Respondents and the Solicitor General contend that the EEOA's limits on courts' remedial authority apply only in the context of busing and desegregation. Flores Br. 27 n.4; U.S. Br. 13 n.4. That assertion is irreconcilable with the statutory text. On its face, section 1713 applies whenever a court formulates "a remedy for a denial of equal educational opportunity." The provision's non-restrictive clause ("which may") merely recognizes that a remedy "may" involve busing. *See* BRYAN A. GARNER, A DICTIONARY OF MODERN AMERICAN USAGE 422, 647-58 (distinguishing between restrictive and non-restrictive clauses). The

provision cannot be reasonably interpreted as being limited *solely* to busing remedies. *HUD v. Rucker*, 535 U.S. 125, 131 (2002) (rejecting interpretation that "runs counter to basic rules of grammar"). In any event, the EEOA's focus on busing and desegregation confirms the Legislature's overarching point—Congress devised the EEOA to guide courts in fashioning remedies for dismantling dual school systems. 20 U.S.C. § 1702(a). Congress could not have intended to constrain courts' authority when eliminating the vestiges of segregation, but nonetheless grant courts broad discretion to dictate local educational policy.

4. Holding that federal courts should not continue to enforce an eight-year-old injunction imposing sweeping, state-wide funding mandates would not displace the EEOA. Flores Br. 54. To the contrary, the "EEOA remains a vital protection against civil rights violations." Pet. Br. 60. If local "schools" and "districts" operating under a state-approved NCLB plan fall short of their EEOA obligations, then a state or local educational agency may be required to take corrective action. *See* Asian Am. Legal Def. & Educ. Fund Br. 25-26, 35. But, under the EEOA, asserted violations of individual rights should be redressed through targeted remedies aimed at correcting "particular" deficiencies in individual schools or school districts. 20 U.S.C. § 1712; *see Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982) (courts should decide questions "in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action"). There is a stark

difference between requiring educational agencies to do a better job of addressing particular deficiencies and ordering a state legislature to dispense state-wide funding remedies. Contrary to Respondents' assertions, this distinction poses no line-drawing problem. *See* Flores Br. 54 n.12. As the Court has recognized in other contexts, a "case-by-case approach" is the "traditional" and "normal ... mode of operation of the courts." *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 894 (1990); *see also Lewis v. Casey*, 518 U.S. 343, 359 (1996).

5. Respondents assert that the EEOA must be interpreted to authorize state-wide remedies for "systemic failures" because "most violations of the EEOA derive in some measure from broader, systemic failures." Flores Br. 54 n.12. This broadside is supported by no meaningful analysis. Nothing in the EEOA suggests that courts may require a state legislature to adopt across-the-board funding increases.

Castaneda confirms this point. Contrary to Respondents' assertions, *Castaneda* does not suggest that a federal court may mandate States to provide resources earmarked for ELL instruction. Instead, the appropriate inquiry is whether "the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school." *Castaneda*, 648 F.2d at 1010. As the Fifth Circuit explained, Congress "must have intended to insure that schools made a genuine and good faith effort, consistent with local circumstances and resources, to remedy the language deficiencies of their students." *Id.* at 1009. Accordingly, the

obligation is on the local "school system" to "follow through with practices, resources, and personnel necessary to transform" their educational theory "into reality." *Id.* at 1010. That is exactly what happened in Arizona.

3. HB 2064 Poses No Impediment To Rule 60(b) Relief.

Respondents contend that Rule 60(b) relief should be denied because HB 2064 is legally infirm. Their focus on HB 2064 confirms that this case is all about money.

1. In Respondents' view, HB 2064 is unlawful because it cuts off Group B and Structured-English-Immersion funding for ELL students after two years. *See* Flores Br. 35. But that position reflects only one side of a contentious policy debate. In Proposition 203, Arizona's citizens expressed profound dissatisfaction with costly "experimental language programs." Pet. App. 370a. Indeed, Arizona's citizens declared that "all children in Arizona public schools shall be taught English as rapidly and effectively as possible," *id.*, and that ELL students "shall be educated though sheltered English Immersion during a temporary transition period *not normally intended to exceed one year.*" *Id.* 373a (emphasis added). Given this, the Legislature, in turn, required a shift in funding mechanisms after two years of unsuccessful ELL instruction. It did so because, although the amount of Group B funds a school receives is based on its number of ELL students, the funds may be used for any discretionary purpose. *See* Pet. App. 306a. In that context, holding schools temporally

accountable avoids perverse incentives to keep students languishing in special-language programs.

As Respondents concede, HB 2064 does not deprive schools of funds for those ELL students who are not English-proficient after two years. *See* Flores Br. 35. Instead, HB 2064 provides additional funds for "compensatory instruction." As defined by statute, "compensatory instruction" means "programs in addition to normal classroom instruction," including "individual or small group instruction, extended day classes, summer school or intersession school," that are limited to improving the English proficiency of current and recently reclassified ELL students. Ariz. Rev. Stat. § 15-756.11(G); Pet. App. 306a. The statute thus rationally requires that, if regular ELL programs are not working, educators must take action to develop individualized programs to help struggling students. Contrary to the Solicitor General's suggestion, compensatory instruction funds are not limited to instruction "outside of the normal class day." U.S. Br. 30. Instead, they may be used at any point in the day so long as they are used "in addition to normal classroom instruction." Ariz. Rev. Stat. § 15-756.11(G). There has been no showing or finding by the district court that this approach is unsupported by sound educational theory.

2. Respondents complain that HB 2064 runs afoul of NCLB because the lower courts found that the measure violates federal supplanting restrictions. Flores Br. 36. This conclusion is flawed. NCLB merely prohibits States from employing federal funds to cover "core" educational

obligations that would otherwise be funded with state monies; it does not require that States pay *all* costs of ELL instruction. Any contrary interpretation renders meaningless NCLB's Title III, as well as several provisions of Title I, inasmuch as the statute specifically contemplates using federal funds for ELL instruction. *See* 20 U.S.C. §§ 6801, 6302.

More fundamentally, the lower court should not have reached out to decide the issue. NCLB includes no private right of action; instead, NCLB compliance falls within the Department of Education's exclusive jurisdiction. *See Spellings*, 453 F. Supp. 2d at 486-87. The district court's approach thus effectively permitted Respondents to pursue a private right of action that Congress never intended. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). To be sure, the Department of Education has issued an informal, non-binding letter suggesting that HB 2064 may, in its judgment, violate NCLB's supplanting restrictions. But that letter is not final agency action. *See General Motors Corp. v. EPA*, 363 F.3d 442, 450 (D.C. Cir. 2004) (agency correspondence not final action if it does not impose an obligation to act). Nor is it a formal determination that HB 2064 violates federal law. The district court's interceding order has thus short-circuited the ordinary administrative process.

III. The Court Should Direct The Restoration Of Local Control Over Arizona's Schools.

This case has placed the federal judiciary at the center of a highly politicized, contentious debate

over how best to run Arizona's schools. The district court's state-wide injunction, commandeering the Legislature's spending power, stretches judicial authority to its outer limits. State-wide spending mandates directed not at "educational agencies" but at a state legislature go far beyond what Congress contemplated under the EEOA and raise serious federalism and separation-of-powers concerns. Those concerns are heightened by the Attorney General's tepid defense on the merits, failure to appeal in 2000, and subsequent efforts to "defend" the district court's injunction. Flores Br. 22.

Whatever the propriety of the district court's injunction in 2000, the fact remains that in the last eight years circumstances have significantly changed. Respondents resist that conclusion, but they do not dispute that Arizona has implemented an entirely new approach to teaching ELL students; that Congress has comprehensively restructured federal education policy; and that, as the Ninth Circuit acknowledged, the State has "developed a significantly improved infrastructure for ELL programming." Pet. App. 46a. Nor can they deny that Nogales's schools are "doing substantially better." *Id.*

In light of these changed circumstances, the Rule 60(b) question is whether the federal judiciary should continue to require dramatic state-wide funding increases. The answer is no.

CONCLUSION

For the foregoing reasons, the Court should reverse the Ninth Circuit's decision below and direct the vacatur of the district court's injunction.

Respectfully submitted,

RICK RICHMOND
CHRISTOPHER C. CHIOU
STEVEN A. HASKINS
KYLE T. CUTTS
KIRKLAND & ELLIS LLP
777 South Figueroa St.
Los Angeles, CA 90017
(213) 680-8400

KENNETH W. STARR
Counsel of Record
KIRKLAND & ELLIS LLP
777 South Figueroa St.
Los Angeles, CA 90017
(213) 680-8400

DAVID J. CANTELME
D. AARON BROWN
PAUL R. NEIL
CANTELME & BROWN, PLC
3030 N. Central Avenue
Phoenix, AZ 85102
(602) 200-0104

ASHLEY C. PARRISH
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000

Counsel for Petitioners

April 13, 2009

ADDENDUM

TABLE OF CONTENTS

Letter From Governor of Arizona
Janice K. Brewer to Attorney General
Terry Goddard, dated March 11, 2009 ..... Add-2

Letter From Attorney General
Terry Goddard to Governor of Arizona
Janice K. Brewer, dated March 16, 2009 ..... Add-3

Letter From Governor of Arizona
Janice K. Brewer to Attorney General
Terry Goddard, dated March 31, 2009 ..... Add-5

Excerpt from Testimony of
Rosalie Porter Add-8

Excerpt from Testimony of
Irene Moreno Add-10

Excerpts from Testimony of
Kelt Cooper Add-11

Excerpt from Testimony of
Guillermo V. Zamudio Add-17

Table of State Procedures for
NCLB Complaints Add-19

Letter From Governor of Arizona Janice K. Brewer to Attorney General Terry Goddard dated March 11, 2009

Re: *Flores v. State of Arizona*, Nos. 08-289 and 08-294

Dear Mr. Goddard:

Your office represents the State of Arizona in *Flores v. Arizona*. It is my understanding that your office has acted at the behest of my predecessor throughout the course of this litigation. I therefore write to clearly establish the position of the State of Arizona in these cases currently pending before the United States Supreme Court.

After carefully reviewing the above cases and the issues currently before the Court, I hereby direct you to file a brief at the Court on behalf of the State of Arizona adopting and joining in the positions taken by the Superintendent of Public instruction, the Speaker of the Arizona House of Representatives, and the President of the Arizona Senate.

Further, you are directed to take any and all actions on behalf of the State of Arizona necessary to aid, facilitate and support the positions taken by the Superintendent, the Speaker, and the President in these cases before the Court.

Sincerely,

/s/ Janice K. Brewer
Governor

cc: The Honorable Thomas C. Horne
The Honorable Bob Burns
The Honorable Kirk Adams

Letter From Attorney General Terry Goddard to Governor of Arizona Janice K. Brewer dated March 16, 2009

Dear Governor Brewer:

I have received your March 11, 2009 letter concerning *Flores v. State of Arizona*. It has always been my practice to attempt to work cooperatively with the Governor on litigation involving the State, and I hope we will be able to continue that practice.

Your letter directs me to file a brief with the United States Supreme Court on behalf of the State of Arizona adopting and joining in the positions taken by the Superintendent of Public Instruction, the Speaker of the Arizona House of Representatives, and the President of the Arizona Senate. Your letter appears to be based on the mistaken premise that the Governor determines the legal position to be taken on behalf of the State of Arizona in pending litigation. The State of Arizona and the Arizona State Board of Education are the defendants in the *Flores* case; the Governor is not a party. In any event, Arizona law makes it clear that as the chief legal officer for the State, the Attorney General is responsible for representing the State and rendering such legal services as the State requires, which includes determining the appropriate legal positions to be taken on behalf of the State.

Although I always value your input and input from your staff, it is my responsibility to determine the legal position to be taken on behalf of the State of Arizona in the *Flores* case. My staff has sent your chief counsel a draft of the brief we are preparing. I welcome any constructive comments he might have.

You may not be aware of the June 6, 2008, letter from the United States Department of Education to Superintendent Horne, so enclosed is a copy. In that letter, the United States Department of Education has put the State of Arizona on notice that the offsets required by the Arizona law (HB 2064) violate the federal Elementary and Secondary Education Act. Such a violation could cause the State to lose $600 million *per year* federal aid to education, with serious adverse consequences to all K-12 students in Arizona. One of the principal objectives of the brief we are preparing to file with the Supreme Court is to minimize any risk that the State might suffer from such a devastating financial blow. For the sake of Arizona's students, not to mention the overall fiscal health of our State, we must do no less.

The Supreme Court should render a decision by the end of June. I hope we can work together based on the guidance we receive from the Court to address any remaining issues in this litigation.

Sincerely,

/s/ Terry Goddard
Attorney General

Letter From Governor of Arizona Janice K. Brewer to Attorney General Terry Goddard dated March 31, 2009

Re: *Flores v. State of Arizona*, Nos. 08-289 and 08-294

Dear Attorney General Goddard:

I am surprised that you have chosen to ignore my directive to take any and all actions on behalf of the State of Arizona necessary to aid, facilitate and support the positions taken by the Superintendent, the Speaker, and the President in the above case before the United States Supreme Court.

While I am pleased that you concede that the prior disagreement among State officers in this case does not eliminate federalism concerns or alter the 60(b) analysis in any fashion, your other arguments are contrary to the position of the State of Arizona. I am certain the Court will soon realize that you have not appropriately set forth the position of the State in these cases.

Your letter dated March 16, 2009, erroneously asserts that you alone determine the legal position on behalf of the State of Arizona in pending litigation. This is contrary to the Arizona Constitution, state law and your prior actions in these cases. Moreover, your position runs afoul of the basic role of an attorney, which is to represent the client and abide by the client's decisions concerning the objectives of representation. As you noted in the Arizona Republic today, "[i]t's black-letter law that conflicts of interest matter . . . and if there's a conflict, you've got to step aside."

You simply cannot serve as both attorney and client in this matter.

Our state constitution prescribes that the Governor has the duty of "tak[ing] care that the laws [are] faithfully executed" [art. 5, § 4] and performing "such duties as are prescribed by the constitution and as may be provided by law" [art. 5, § 1(C)]. These provisions clearly establish that the Governor is in charge of the Executive Branch and sets the policy and positions of the State of Arizona. Such powers do not and cannot devolve to the Attorney General simply because a lawsuit is brought against the State.

According to the Arizona Constitution [art. 5, § 9], your powers as Attorney General are limited to those prescribed by law. Your role by constitutional design is one of legal advisor and not policy maker. There is no statutory authority that permits you to disregard the direction of the Governor and establish state policy in matters involving the State before the U.S. Supreme Court. As the Arizona Supreme Court so aptly stated in *Arizona State Land Dep't. v. McFate*, 87 Ariz. 139, 348 P.2d 912 (1960), "the Governor alone, and not the Attorney General, is responsible for the supervision of the executive department and is obligated and empowered to protect the interests of the people and the State by taking care that the laws are faithfully executed."

As I noted in my previous letter, your office acted at the direction of my predecessor throughout the course of this litigation. For example, during your testimony on January 26, 2006, before the House of Senate Joint Appropriations Committee you responded to a question from Representative

Knaperek by asserting that you represent the Governor in this case. Moreover, during the oral argument at the Ninth Circuit on December 4, 2007, counsel for the State told the court in no uncertain terms that the Governor was his client and would have to be consulted with regard to any decision made on behalf of the State. There are other examples in the case history where the Governor directed you to take positions in the case and you rightfully abided. It is troubling that your position has changed now that I have assumed the office of Governor. I fear politics may be at play.

If you continue to insist that you alone speak for the State of Arizona in litigation then I will pursue legislation that will require you to act within the scope of your constitutional authority and to refrain from exercising powers not lawfully yours in future litigation involving the State.

I hope you will reconsider your position. In these challenging times we should be working together as elected officials rather than trying to usurp and undermine the authority of another office.

/s/ Janice K. Brewer
Governor

cc: The Honorable Thomas C. Horne
The Honorable Bob Burns
The Honorable Kirk Adams

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MIRIAM FLORES, et al., Plaintiffs, vs. STATE OF ARIZONA; et al., Defendants.	Docket No. CV92-596 TUC-RCC Tucson, Arizona January 9, 2007 9:58 a.m.

[PORTER, T-1, 110-111]

Excerpt from Testimony of Rosalie Porter

* * *

p. 110

. . .

Q. Is there a difference in the rate of learning English between younger children and older children?

A. Most of the research that's ever been done proves younger children starting at age four or five are most easily capable of learning a second language and capable of developing literacy in a second language. That is not just learning to speak, but learning to read and write in a second language.

Q. Why is that when you're younger?

A. I guess that's the way human beings are wired. Now, there's another side to this, though. Older children are more efficient learners, and let me explain that a little bit.

You cannot take a five-year-old child and sit him down at a desk and say, "Now, Jose, we're going to teach you English for four hours." They can't sit still that long. But you can take a child at that age and teach them English through games and songs, pictures, and all sorts of things and you're going to develop the language very quickly.

p. 111

Younger children are not -- they're not as shy, they're not afraid to make mistakes. Now, older children are more efficient learners and a high school student can take three or four hours a day of English, but when you get to that magic age 13, kids going through adolescence are not as readily willing to speak a different language in class and make mistakes and have other kids laugh at them.

So there are -- you know, there are differences. Certainly we would like to start early with children who need to learn English. It is the most effective way to do it.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MIRIAM FLORES, et al., Plaintiffs, vs. STATE OF ARIZONA; et al., Defendants.	Docket No. CV92-596 TUC-RCC Tucson, Arizona January 11, 2007 10:00 a.m.

[MORENO, T-3, 60:3-12]

Excerpt from Testimony of Irene Moreno

* * *

p. 60

. . .

Q. Now, would you say the trend here from elementary to middle to high school is for performance to decline at these schools?

A. Yes.

Q. That's generally true for English language learners, isn't it?

A. I think it's generally that way for students as a whole. As a middle school teacher there's a lot of other things going on and we -- they had a tendency to not do as well.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MIRIAM FLORES, et al., Plaintiffs, vs. STATE OF ARIZONA; et al., Defendants.	Docket No. CV92-596 TUC-RCC Tucson, Arizona January 12, 2007 10:15 a.m.

[COOPER, T-4, 10-13]

Excerpt from Testimony of Kelt Cooper

* * *

p. 10

. . .

Q. I guess my question was, did the -- did the Nogales Unified School District after Prop 203 passed move to structured English immersion and did it have a positive effect in terms of getting English language learners to learn?

A. Yeah, and I think also it eliminated the tremendous debate that exists even in this forum here on which modality is the best, because it limited the discussion and arguments which I think caused such a variety of individual applications out in the classroom.

So it certainly limited the political and philosophical debate on which was the most appropriate program because it narrowed it. So it simplified our work because it narrowed the scope and the focus, which I think is always good because then you can analyze the results better.

Q. And by the time that you left in June of 2005 were all of the schools in the Nogales Unified School District following the structured English immersion strategies?

A. To one degree or another, yes.

Q. Now, yesterday you spoke briefly about the elimination of teacher aides in the basic classroom.

A. Yes.

p. 11

Q. Now, when we talk about the elimination of teacher aides in the basic classroom, was that for all students or was it simply for ELL students?

A. Over the years it's been my belief and my observations that teacher aides in most circumstances wind up picking up a great deal of the instructional load. They're delegated certain responsibilities by the teachers over time as trust is developed and relationships are developed between the teacher and the teacher aide. It's been my belief long held that in so doing the teachers are relinquishing some of the diagnostic benefits of doing the instruction themselves. As the classes we reduced in size, one, from a fiscal aspect they were no longer needed, we could save money by not having them in the regular classrooms, but more importantly, we were trying to design a program

where the teachers were more engaged directly with their students rather than delegating some of their instructional and diagnostic responsibilities to teacher assistants.

However, in cases where you've got multiply impaired students where there's a great deal of handicaps and there's a great need for a one-to-one or two-to-one ratios we certainly kept that in mind because of the severity of some of our students' needs

p. 12

in special education, and in addition, as we were constructing opportunities for teachers to have prep time at the elementary schools, which never existed before, we introduced physical education courses in the elementary school, which allowed great numbers of students at a single time to go out into the play yard under the supervision of a PE teacher and some aides, and that was done to facilitate the numbers, which in turn allowed teachers to have common prep time so they could do individual or group prep planning.

Q. With those exceptions, physical education, special education, were teacher aides essentially eliminated from the classroom per your recommendation to the board of education?

A. I don't know if it was an actually recommendation, it was just a process that we followed. We just began to not fill teacher aides. And the board was aware of that process all through.

And, again, I think in many circumstances teacher aides are really a mechanism or an opportunity to generate additional jobs in a community as a lot of schools have the schools being

their principal employer, so if they can generate a few extra jobs in teacher aides it generates jobs in the community.

But from my perspective I didn't see any

p. 13

sense that we were designed to be the employer for the community rather than focusing on direct instruction.

Q. I think you may have mentioned this yesterday, but did you say that many of the aides had no GED?

A. Many of the aides were substandard, didn't speak English. I wouldn't want my kids to be instructed by them. GEDs, may or may not have had them. If they had a GED it's hardly what I consider a type of educational background I'd want to have as the primary -- one of the coprimary teachers for the student, which is usually what occurs in these classrooms.

Q. So are you saying on a cost-benefit analysis it's better to have a good-quality teacher and lower classrooms -- lower-size classrooms instead of having aides for every classroom?

A. Well, that's a maxim that I carried through time and time again with the principals, that I'd rather have smaller classes, quality teachers and fewer, if any, aides at all, but the idea was I'd rather have smaller classrooms and better teachers, full certified teachers.

* * *

[COOPER, T-4, 71]

Excerpt from Testimony of Kelt Cooper

* * *

p. 71

. . .

Q. Okay. Now, one last question. Had the legislature of the state of Arizona given you additional money in the year 2000 and the structures that you found that were in place in August of 2000 had been left in place, would the additional money in your opinion have made any difference to these students in the Nogales Unified School District?

A. No.

MR. BISTROW: No further questions.

THE COURT: Mr. Cantelme.

CROSS-EXAMINATION

BY MR. CANTELME:

Q. Mr. Superintendent, did I understand it that you headed up the fourth or fifth poorest district in Texas at one time?

A. Yes.

Q. Sounds like you've got a lot of empathy for poor children, sir?

A. Absolutely.

Q. And also sounds like you detest the waste of tax money that could help poor children?

A. That is correct.

MR. CANTELME: Nothing Further, Your Honor.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MIRIAM FLORES, et al., Plaintiffs, vs. STATE OF ARIZONA; et al., Defendants.	Docket No. CV92-596 TUC-RCC Tucson, Arizona January 18, 2007 9:52 a.m.

[ZAMUDIO, T-6, 128]

Excerpt from Testimony of Guillermo V. Zamudio

* * *

p. 128

. . .

Q. I agree with you, sir, that is a reality. In fact, Dr. Porter told us that the children that come to your -- that come to the United States in the high school years, for them it may be more difficult than it is for the children that come as kindergartners; correct?

A. I believe that that would be correct. I heard her testimony to that and I concur that if they come in in high school and they are beginning to learn a new language, obviously it's a much more difficult task and challenge for those students as compared to those who may be more skilled in the language.

Q. Is it a fair statement the way our brains are constructed that it's easier to learn another language the younger you are, at least in the K-12 range?

A. My understanding is that the younger you are the easier it is to learn a new language. That's my understanding.

Table of State Procedures for NCLB Complaints

STATE	REGULATION	SOURCE
Alabama	Federal Programs Section - Complaint Procedures	Alabama Department of Education, https://egrant.alsde.edu/Acceleg rants/Document Library/Documents/7E15A9E0-14D6-4D62-A478-AA5D484895B4.doc (last visited Apr. 9, 2009).
Arizona	NCLB Complaint Procedures	Arizona Department of Education, http://www.ade.state.az.us/asd/nclb/ (last visited Apr. 9, 2009).

STATE	REGULATION	SOURCE
Arkansas	Complaint Resolution Procedures	Arkansas Department of Education, arkedu.state.ar.us/commemos/attachments/LS-07-013_ComplaintResolProced.doc (last visited Apr. 9, 2009).
California	UCP Brochure 2009 - Complaint Procedures	California Department of Education, http://www.cde.ca.gov/re/cp/uc/documents/UCPBrochure.2009.pdf (last visited Apr. 9, 2009).
Colorado	Federal Complaint Procedure	Colorado Department of Education, http://www.cde.state.co.us/FedPrograms/NCLB/fdcomplaint.asp (last visited Apr. 9, 2009).

STATE	REGULATION	SOURCE
Connecticut	Complaint Resolution Procedure	Connecticut State Department of Education, http://www.csde.state.ct.us/public/cedar/nclb/CRP/Complaint%20Resolution%20Procedure%2008.pdf (last visited Apr. 9, 2009).
Florida	NCLB Complaint Process	Florida Department of Education, http://www.fldoe.org/NCLB/complaint_process.asp (last visited Apr. 9, 2009).

STATE	REGULATION	SOURCE
Georgia	Complaint Procedures under the No Child Left Behind Act	Georgia Department of Education, http://public.doe.k12.ga.us/DMGetDocument.aspx/Georgia%20Department%20of%20Education%20SEA%20Complaint%20Procedures.pdf?p=4BE1EECF99CD364EA5554055463F1FBBF5D074D5FB1F2CAEB3B63B3ECB220CDD26C2114F3C57D8D2A94DF3E8B084D770&Type=D (last visited Apr. 9, 2009).

STATE	REGULATION	SOURCE
Indiana	NCLB Complaint Procedures	Indiana Department of Education, www.doe.in.gov/TitleI/pdf/NCLBComplaintProced.pdf (last visited Apr. 9, 2009).
Kansas	Complaint Resolution Procedures	Kansas State Department of Education, www.ksde.org/Portals/0/Title%20Programs%20and%20Services/NCLB/complaint_res_proc_b.pdf (last visited Apr. 9, 2009).
Maine	Complaint Resolution Procedures	Maine Department of Education, http://www.state.me.us/education/nclb/tia/home.htm (last visited Apr. 9, 2009).

STATE	REGULATION	SOURCE
Mississippi	Mississippi Administrative Procedure for Complaints or Appeals under the No Child Left Behind Act of 2001	Mississippi Department of Education, www.mde.k12.ms.us/innovative_support/compliance/MS%20Complaint%20Policy.pdf (last visited Apr. 9, 2009).
Missouri	NCLB Complaint Procedures	Missouri Department of Elementary and Secondary Education, www.dese.mo.gov/divimprove/fedprog/grantmgmnt/PDF_Files/07_nclb_complaint_resolution.pdf (last visited Apr. 9, 2009).

STATE	REGULATION	SOURCE
New Jersey	Complaint Policy and Procedures	State of New Jersey Department of Education, http://www.nj.gov/education/grants/nclb/issues/complaint_policy.htm (last visited Apr. 9, 2009).
North Carolina	Complaint Resolution Procedures	Public Schools of North Carolina, State Board of Education, http://www.ncpublicschools.org/nclb/federal/complaint/ (last visited Apr. 9, 2009).
North Dakota	Dispute Resolution Policy Requirements	North Dakota Department of Public Instruction, www.dpi.state.nd.us/title1/dispute.pdf (last visited Apr. 9, 2009).

STATE	REGULATION	SOURCE
Ohio	Complaint Procedures	Ohio Department of Education, https://ccip.ode.state.oh.us/DocumentLibrary/ViewDocument.aspx?DocumentKey=926 (last visited Apr. 9, 2009).
Oklahoma	Federal Programs Complaint Procedures	Oklahoma State Department of Education, http://sde.state.ok.us/NCLB/Complaint.html (last visited Apr. 9, 2009).
Pennsylvania	NCLB Complaint Resolution	Pennsylvania Department of Education, http://www.pde.state.pa.us/k12/cwp/view.asp?a=166&q=108181 (last visited Apr. 9, 2009).

STATE	REGULATION	SOURCE
South Carolina	Complaint Resolution Procedures	South Carolina Department of Education, http://ed.sc.gov/agency/Accountability/Federal-and-State-Accountability/old/fp/Title_I/titleI.html (last visited Apr. 9, 2009).
South Dakota	State Complaint Procedure for NCLB Federal Programs	South Dakota Department of Education, http://doe.sd.gov/nclb/ (last visited Apr. 9, 2009).
Tennessee	Complaint Procedures for Federal Programs under the No Child Left Behind Act of 2001	Tennessee Department of Education, http://www.state.tn.us/education/fedprog/fpcomplaints.shtml (last visited Apr. 9, 2009).

STATE	REGULATION	SOURCE
Texas	No Child Left Behind Federal Program Complaints	Texas Education Agency, http://ritter.tea.state.tx.us/Complaints/index_AllComplaints.html (last visited Apr. 9, 2009).
Wisconsin	Wisconsin Administrative Procedure for Complaints or Appeals under the No Child Left Behind Act of 2001	Wisconsin Department of Public Instruction, http://dpi.wi.gov/esea/topics.html (last visited Apr. 9, 2009).

AMICUS CURIAE BRIEF

Nos. 08-289 and 08-294

In the Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT, ARIZONA PUBLIC INSTRUCTION, PETITIONER

v.

MIRIAM FLORES, ET AL.

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES, ET AL., PETITIONERS

v.

MIRIAM FLORES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

MICHAEL F. HERTZ
LORETTA KING
Acting Assistant Attorneys General

EDWIN S. KNEEDLER
Deputy Solicitor General

NICOLE A. SAHARSKY
Assistant to the Solicitor General

MARK B. STERN
DENNIS J. DIMSEY
ANGELA M. MILLER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

PHILIP H. ROSENFELT
Deputy General Counsel

SUSAN E. CRAIG
Assistant General Counsel

RONALD PETRACCA
Attorney
Department of Education
Washington, D.C. 20202

QUESTIONS PRESENTED

1. Whether the court of appeals used an incorrect legal standard in reviewing the district court's decision not to dissolve its remedial orders under Federal Rule of Civil Procedure 60(b)(5).

2. Whether a State's receipt of federal funding under Title III of the Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act of 2001, 20 U.S.C. 6801 *et seq.*, necessarily demonstrates that a State is fulfilling its obligations under the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1701 *et seq.*

3. Whether the district court abused its discretion in declining to dissolve the remedial orders on the ground that compliance was no longer required due to changed factual circumstances in Nogales, Arizona.

4. Whether the district court abused its discretion in declining to dissolve the remedial orders on the ground that HB 2064 fully satisfied them.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 9
Argument:
The district court did not abuse its discretion in declining to dissolve the remedial orders 11
A. The district court's orders required the State to adopt and fund an ELL program to meet its obligations under the EEOA 11
B. The court of appeals applied the correct standards under Rule 60(b)(5) 15
C. The court of appeals' application of the Rule 60(b)(5) standards was correct 18
1. Receipt of funds under Title III of NCLB does not itself demonstrate "appropriate action" under the EEOA 19
2. Asserted changed circumstances in Nogales did not compel dissolution of the orders 24
3. HB 2064 does not fully satisfy the judgment 28
Conclusion 33

TABLE OF AUTHORITIES

Cases:

Agostini v. *Felton*, 521 U.S. 203 (1997) 16, 17
Board of Educ. v. *Dowell*, 498 U.S. 237 (1991) 16
Castaneda v. *Pickard*, 648 F.2d 989 (5th Cir. 1981) 2, 5, 13, 24, 25
Freeman v. *Pitts*, 503 U.S. 467 (1992) 16
Frew v. *Hawkins*, 540 U.S. 431 (2004) 16

Cases—Continued: Page

Gomez v. *Illinois State Bd. of Educ.*, 811 F.2d 1030 (7th Cir. 1987) 3, 25
Hutto v. *Finney*, 437 U.S. 678 (1978) 13
Idaho Migrant Council v. *Board of Educ.*, 647 F.2d 69 (9th Cir. 1981) 25
Keyes v. *School Dist. No. 1*, 576 F. Supp. 1503 (D. Colo. 1983) 3, 19
Lau v. *Nichols*, 414 U.S. 563 (1974) 2
Milliken v. *Bradley*, 433 U.S. 267 (1977) 14
Missouri v. *Jenkins*, 495 U.S. 33 (1990) 15
Morton v. *Mancari*, 417 U.S. 535 (1974) 24
Newark Parents Ass'n v. *Newark Pub. Sch.*, 547 F.3d 199 (3d Cir. 2008) 23
Rufo v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992) 16, 17
System Fed'n No. 91 v. *Wright*, 364 U.S. 642 (1961) 16
United States v. *Swift & Co.*, 286 U.S. 106 (1932) 17
United States v. *Texas*, 680 F.2d 356 (5th Cir. 1982) 19
Valeria G. v. *Wilson*, 12 F. Supp. 2d 1007 (N.D. Cal. 1998), aff'd, 307 F.3d 1036 (9th Cir. 2002) 3

Constitution, statutes, regulation and rule:

Ariz. Const. Art. XI § 1(a) 14, 28
Civil Rights Act of 1964, Tit. VI, 42 U.S.C. 2000d *et seq.* 2
Elementary and Secondary Education Act of 1965, as amended by No Child Left Behind Act of 2001, 20 U.S.C. 6301 *et seq.* 1, 3

Statutes, regulation and rule—Continued: Page

20 U.S.C. 6301 19
20 U.S.C. 6311(b)(2) 22
20 U.S.C. 6311(b)(3) 22
20 U.S.C. 6311(b)(3)(C)(ix)(III) 31
20 U.S.C. 6311(b)(3)(C)(x) 31
20 U.S.C. 6321(b) 31
20 U.S.C. 6623(b) 31
Tit. III, 20 U.S.C. 6801 *et seq.* ..... *passim*
20 U.S.C. 6812(1) 3, 20
20 U.S.C. 6821 21
20 U.S.C. 6823 ..... 21, 22
20 U.S.C. 6823(b) 3, 20
20 U.S.C. 6823(b)(2) 24
20 U.S.C. 6823(c) 3, 22
20 U.S.C. 6823(f) 20
20 U.S.C. 6825 21
20 U.S.C. 6825(g) 31
20 U.S.C. 6826 21
20 U.S.C. 6826(a) 20
20 U.S.C. 6842 ..... 21, 22
20 U.S.C. 6842(b) 4, 20
20 U.S.C. 6843 ..... 4, 20
20 U.S.C. 6847 ..... 4, 8, 23
20 U.S.C. 6849 ..... 4, 21
Equal Educational Opportunities Act of 1974, 20 U.S.C. 1701 *et seq.* ..... *passim*
20 U.S.C. 1703 ..... 2, 19, 21, 23

Statutes, regulation and rule—Continued: Page

20 U.S.C. 1703(f) ..... *passim*
20 U.S.C. 1706 ..... 1, 19, 23
20 U.S.C. 1709 ..... 1, 19
20 U.S.C. 1712 13
20 U.S.C. 1713 13
20 U.S.C. 1720(a) 25
20 U.S.C. 1758 13
20 U.S.C. 1232a 21
20 U.S.C. 1234c 22
20 U.S.C. 3403(b) 21
20 U.S.C. 7843 4
20 U.S.C. 7844(a)(3)(C) 23
20 U.S.C. 7902 31
20 U.S.C. 7906(b) 21
20 U.S.C. 7914(a) 23
Ariz. Rev. Stat. Ann. § 15-752 (West 1991) 26
34 C.F.R.:
Sections 299.10-299.11 23
Section 299.10(b) 23
Fed. R. Civ. P. 60(b)(5) ..... *passim*

Miscellaneous:

State of Arizona, *Consolidated State Application* (2002) 22

Miscellaneous—Continued: Page

Consolidated State Performance Report for State Formula Grant Programs Under the Elementary and Secondary Education Act As Amended By the No Child Left Behind Act of 2001, School Year 2007-2008: Arizona (2008) 21, 22

Structured English Immersion Models of the Arizona English Language Learners Task Force (Apr. 10, 2008) <http://www.ade.state.az.us /ELLTaskForce/2008/SEIModels04-10-08.pdf> 32

In the Supreme Court of the United States

No. 08-289

THOMAS C. HORNE, SUPERINTENDENT,
ARIZONA PUBLIC INSTRUCTION, PETITIONER

v.

MIRIAM FLORES, ET AL.

No. 08-294

SPEAKER OF THE ARIZONA HOUSE OF
REPRESENTATIVES, ET AL., PETITIONERS

v.

MIRIAM FLORES, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case concerns a judgment and a series of remedial orders entered under the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1701 *et seq.* The Attorney General is authorized to bring civil actions under that statute and to intervene in private actions brought under it. See 20 U.S.C. 1706, 1709. The case also concerns Title III of the Elementary and Secondary Education

Act of 1965, as amended by the No Child Left Behind Act of 2001, 20 U.S.C. 6801 *et seq.* The Secretary of Education is responsible for administering those provisions.

STATEMENT

1. a. The Equal Educational Opportunities Act of 1974 (EEOA), 20 U.S.C. 1701 *et seq.*, prohibits a State from denying equal educational opportunity to any person "on account of his or her race, color, sex, or national origin." 20 U.S.C. 1703. The denial of equal educational opportunity includes the failure by an education agency "to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. 1703(f).

Section 1703(f) of the EEOA codifies the central holding of *Lau* v. *Nichols*, 414 U.S. 563, 566-567 (1974). In *Lau*, this Court held that failing to provide English language instruction to non-English speaking students denies those students a meaningful opportunity to participate in a State's educational programs, in violation of regulations issued under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* Title VI applies only to programs or activities that receive federal financial assistance, *ibid.*, but the EEOA's equal-opportunity guarantee does not depend upon receipt of federal funds.

Neither the EEOA's text nor its legislative history defines "appropriate action." 20 U.S.C. 1703(f). A seminal Fifth Circuit decision, however, established a framework for assessing whether a school district is taking necessary steps to ensure equal educational opportunity. See *Castaneda* v. *Pickard*, 648 F.2d 989, 1009 (1981). Under that framework, a court considers whether: (1) the school system is pursuing a program that is in-

formed by a sound educational theory; (2) the program is "reasonably calculated to implement effectively the educational theory adopted by the school" by providing the "practices, resources and personnel necessary to transform the theory into reality"; and (3) the program has been successful after a legitimate trial period. *Id.* at 1009-1010. The lower courts have uniformly adopted that framework to assess Section 1703(f) claims. See, *e.g.*, *Gomez* v. *Illinois State Bd. of Educ.*, 811 F.2d 1030, 1041-1042 (7th Cir. 1987); *Valeria G.* v. *Wilson*, 12 F. Supp. 2d 1007, 1017-1018 (N.D. Cal. 1998), aff'd, 307 F.3d 1036 (9th Cir. 2002); *Keyes* v. *School Dist. No. 1*, 576 F. Supp. 1503, 1510 (D. Colo. 1983).

b. The federal government has long provided grants to States for educational programs. One such program is contained in Title III of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the No Child Left Behind Act of 2001 (NCLB), 20 U.S.C. 6801 *et seq.* That program is designed to help students with limited English proficiency become proficient in English and meet state academic achievement standards. 20 U.S.C. 6812(1).

If a State wishes to receive Title III funds, it must submit a plan to the Secretary of Education stating that it will establish standards for raising the level of English proficiency and test students to see if those standards are being met. 20 U.S.C. 6823(b). In approving a State's plan, the Secretary determines whether the plan includes the required assurances, see 20 U.S.C. 6823(c), but he does not conduct any substantive review of the State's English-language learner (ELL) programs.

After a plan is approved, the State reports its progress to the Department of Education (DOE). 20 U.S.C.

6843, 7843. It is up to the State to take remedial action if it is not meeting its own targets for improving student performance. See 20 U.S.C. 6842(b), 6849.

Title III does not provide any private right of action, and it includes an express savings clause for "any federal law guaranteeing a civil right." 20 U.S.C. 6847.

2. In Nogales, Arizona, a great majority of students do not speak English as their first language. Pet. App. 6a.[1] As a result, most students participate in ELL programs at some point in their academic careers, making those programs of "enormous importance" to students and parents in Nogales. *Id.* at 6a-7a.

In 1992, respondent Miriam Flores brought this class action, alleging that the State, its Superintendent of Education, and its Board of Education had failed to take appropriate action to overcome language barriers faced by ELL students in Nogales. J.A. 2. Flores contended that there were a number of deficiencies in Nogales's ELL programs that were caused by the State's failure to adequately oversee, administer, and fund ELL education. J.A. 2, 7-10.

In 2000, the district court entered a declaratory judgment that the state respondents were in violation of the EEOA. Pet. App. 117a-153a.[2] The court determined that, although the State had adopted a valid theory for ELL education, it had failed to put in place "programs and practices * * * reasonably calculated" to imple-

---

[1] All references to the "Pet. App." are to the appendix in No. 08-294.

[2] The parties had entered into a partial consent decree prior to trial. The decree addressed issues such as testing, state monitoring of school districts, reclassification of ELL students, and compensatory education. J.A. 19-30. It did not address other elements of an ELL program, such as class size, teacher qualifications, tutoring, instructional materials, and funding.

ment that theory. *Id.* at 147a-149a (citing *Castaneda*, 648 F.2d at 1009-1010).[3] The court identified a number of deficiencies in Nogales's ELL programs, including too few teachers and classrooms, insufficient teaching materials, and an inadequate tutoring program. *Id.* at 149a-150a. The court determined that those deficiencies were due in large part to a state funding system that "b[ore] no relation to the actual funding needed to ensure that [ELL] students in [Nogales]" learn English. *Id.* at 150a.

To comply with the EEOA, the court explained, the State must first "establish minimum standards" for ELL programs, and then adequately fund those programs. Pet. App. 148a-150a. Although the lawsuit arose out of conditions in Nogales, Flores sought—and the court ordered—relief against the State and its officials for defects in its statewide ELL program. *Id.* at 118a, 149a-151a; see Second Amended Complaint 2, 5-7 (Dist. Ct. Dkt. 83). The court observed that the State already was planning to conduct a cost study to develop and fund a new statewide ELL program. Pet. App. 125a, 150a. Accordingly, rather than impose its own standards and funding requirements, the court decided to await the results of that process. *Id.* at 150a-151a. The State did not appeal the declaratory judgment. *Id.* at 15a.

3. Ten months later, the State had failed to complete the promised cost study. J.A. 35. The court therefore ordered the State to prepare the cost study, J.A. 39, while making clear that it was up to "state authorities, whose powers are plenary, to decide how to provide

---

[3] At that time, the State relied on bilingual and English as a second language educational theories. Pet. App. 124a. In November 2000, the State shifted to an English immersion theory. *Id.* at 16a.

[ELL] students with a meaningful Lau program." J.A. 38-39.

By June 2001, a cost study had been completed, but the legislature declined to adopt and fund any programs based on it. J.A. 42. The district court ordered the State to rationally fund the ELL program of the State's choice by January 2002. J.A. 44.

4. In December 2001, the state legislature enacted HB 2010, which increased per-student ELL funding and provided for a more comprehensive cost study. Pet. App. 17a-18a. The district court noted that the State "has never set specific standards for its programs, nor identified the requisite elements, features, or components for such programs and, therefore, has never assessed [the] actual costs" for such programs. J.A. 49. The court nevertheless approved HB 2010 as an "interim measure pending further study and review." J.A. 54; see J.A. 389.

By 2005, the more comprehensive cost study had not been completed. J.A. 389. The district court allowed the State three more months to comply with its judgment. J.A. 390, 392. The State did not do so, and the court held the State in contempt. Pet. App. 172a-174a.

5. In March 2006, the legislature enacted HB 2064. Pet. App. 20a-21a; see *id.* at 268a-334a. HB 2064 created a task force to develop models for school districts to use for ELL programs and provided that the programs would be funded through a per-student allocation and two supplemental statewide funds. *Id.* at 24a-25a. But HB 2064 limited most funding to two years per student and required school districts that wished to seek supplemental funds to subtract from their requests money received from various federal grant programs. *Id.* at 22a-24a.

6. The Speaker of the Arizona House of Representatives and the President of the Senate (petitioners in this Court) intervened in this case. J.A. 55-85. With the Superintendent (also a petitioner in this Court), they moved to purge contempt and dissolve the remedial orders under Federal Rule of Civil Procedure 60(b)(5). See Mot. to Purge Contempt and Dissolve Injunctions 1-2 (Dist. Ct. Dkt. 422) (Rule 60(b)(5) Mot.); Superintendent's Joinder Mot. 1 (Dist. Ct. Dkt. 433).

The district court denied petitioners' motion, holding that HB 2064 did not fulfill the State's EEOA obligations. Pet. App. 175a-187a. Petitioners appealed, and the court of appeals vacated the contempt order and the denial of Rule 60(b)(5) relief and directed the district court to hold an evidentiary hearing. *Id.* at 188a-190a.

After an eight-day hearing, the district court again denied the motion to dissolve the remedial orders. Pet. App. 96a-116a. It explained that evidence of certain educational improvements in Nogales did not justify vacating its orders, because those "fleeting" improvements were "largely" a result of the school district's own efforts and did not discharge the State's obligation to develop and fund a plan for ELL education. *Id.* at 100a-101a, 104a, 111a.

The court also held that HB 2064 does not constitute appropriate action under the EEOA because it "cut[s] off all funding for the incremental cost of ELL classroom instruction" after two years, regardless of whether a student actually learns English, Pet. App. 114a-115a, and "subtracts a proportionate share of the federal funds received by a district or school from the amount that th[e] district or school will receive" for ELL programs in violation of federal law, *id.* at 113a-114a.

7. The court of appeals affirmed. Pet. App. 1a-91a. It noted that petitioners sought "complete relief from [the] judgment"—not a "limited modification," *id.* at 81a—and held that the district court did not abuse its discretion in declining to grant that relief, *id.* at 48a-90a.

The court of appeals determined that an overall increase in state general education spending and management improvements in Nogales did not excuse the State from its obligation to develop and fund an appropriate statewide ELL program. Pet. App. 61a-72a. The court noted that such a program was still needed for Nogales, which continued to face "significant resource constraints" that resulted in "persistent achievement gaps." *Id.* at 36a, 66a.

The court of appeals rejected petitioners' argument that "state compliance with NCLB necessarily satisfies the EEOA." Pet. App. 75a. It explained that the EEOA is "an equality-based civil rights statute" designed to ensure that States provide meaningful ELL programs to all students, while NCLB is a voluntary funding scheme "for overall, gradual school improvement" and expressly provides that it shall not "'be construed in a manner inconsistent with any Federal law guaranteeing a civil right.'" *Id.* at 72a-75a (quoting 20 U.S.C. 6847).

Finally, the court of appeals concluded that HB 2064 does not satisfy the State's obligations, because its two-year funding cut-off is "irrational," Pet. App. 83a-85a, and its offset requirements violate federal law, *id.* at 83a-86a. The court observed, however, that if the State developed the models contemplated in HB 2064, "rationally fund[ed] the new models for the ELL programs," and cured the two key deficiencies in HB 2064, such action would comply with the judgment. *Id.* at 90a.

SUMMARY OF ARGUMENT

In 2000, the district court determined that Arizona was in violation of the EEOA because it failed to adopt and fund a program reasonably calculated to guarantee equal educational opportunity to students with limited English proficiency. The court allowed the State the discretion to define and fund its own ELL program. The State had not done so by 2007. The district court did not abuse its discretion in declining to dissolve its remedial orders under those circumstances.

A. The district court's remedial orders required the State to design and fund an ELL program that is reasonably calculated to help non-native speakers attain proficiency in English. The court did not impose its own policy views or require the State to adopt any particular standards or programs or allocate any specified amount of funding; it deferred to the State to chart its own path to EEOA compliance.

The district court's orders followed directly from the EEOA violation—*i.e.*, that the State had failed to put in place the programs, practices, and resources necessary to implement a recognized theory of ELL education. Although the State agreed that the EEOA required it to adopt and appropriately fund a statewide ELL program, it had not done so at the time of petitioner's motion to dissolve the orders.

B. Rule 60(b)(5) authorizes a district court to modify an injunction when the judgment has been satisfied or when compliance is no longer equitable based on significant changes of fact or law. Although courts considering modification are to apply a flexible approach, whether an injunction should be modified is entrusted to the sound discretion of the district court, and it is the moving party's burden to establish that modification is warranted.

The court of appeals applied those standards in reviewing the district court's ruling.

C. The district court did not abuse its discretion in declining to dissolve the remedial orders in this case.

First, a State's receipt of federal funding under Title III of the NCLB does not itself demonstrate that it is taking appropriate action under the EEOA. Title III is a voluntary funding program, not a civil rights statute. Title III does not set any substantive requirements for ELL programs, and the Secretary does not evaluate the content of States' ELL programs or determine whether they result in equal educational opportunity. Moreover, Title III contains a savings clause that expressly preserves civil rights remedies, such as those under the EEOA.

Second, the educational improvements and funding increases in Nogales that petitioners identified did not require dissolution of the orders. Here, the district court determined that the EEOA requires the State to develop and fund an appropriate statewide system of ELL education, and the State cannot abdicate that responsibility. Programs and funding are still needed in Nogales, where educational improvements have been "fleeting at best" because the State has not provided "clear rules and requirements" for school districts to follow. Pet. App. 100a.

Third, HB 2064 does not comply with the district court's judgment, although it does put in place a statewide scheme that ultimately could lead to compliance if certain changes are made. HB 2064 provides that the State will develop models for ELL education and fund those models. But HB 2064 cuts off ELL funding after two years and requires school districts to use federal funds in a manner that violates federal law. If those de-

ficiencies are corrected, however, and the new ELL models are reasonably funded, the State will be taking appropriate action under the EEOA. Because petitioners sought to dissolve the remedial orders in their entirety before those steps were taken, the district court correctly denied their motion.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO DISSOLVE THE REMEDIAL ORDERS

A. The District Court's Orders Required The State To Adopt And Fund An ELL Program To Meet Its Obligations Under The EEOA

Determining whether the district court should have dissolved its remedial orders first requires understanding the nature of those orders.

1. The district court determined in 2000 that the State was in violation of the EEOA because of systemic deficiencies in ELL education in Nogales caused by a lack of state oversight and funding. Pet. App. 137a-141a, 149a-150a. Although the State had adopted valid educational theories for its ELL instruction, *id.* at 124a, 148a, it had "failed to follow through with [the] practices, resources and personnel necessary to transform theory into reality," *id.* at 151a. Aside from basic educational funds for students generally, the State provided school districts only $150 per ELL student. *Id.* at 125a. That amount, the court found, was not "reasonably calculated to effectively implement" any particular ELL program, and the State "ha[d] not designed any programs, nor implemented any practices, nor committed any resources" to ELL education other than that appropriation, *id.* at 150a. The State did not appeal that crucial determination.

Rather than impose a remedy, the district court permitted the State to design and fund its own program. Pet. App. 153a. But although the State repeatedly assured the court that it would take the necessary steps to adopt and rationally fund an ELL program, see, *e.g.*, Defs.' Trial Mem. 5-6 (Dist. Ct. Dkt. 189); Defs.' Resp. to Pls.' Mot. for Post-J. Relief 1, 6 (Dist. Ct. Dkt. 207) (Defs.' Resp.), it did not do so.

The first step in that process was to complete a cost study. Pet. App. 148a-150a, 156a. The State said such a study was forthcoming at the time of trial, *id.* at 125a, and again later in 2000, J.A. 39. Mindful of the State's interest in managing its own educational system, the district court waited for years for the State to produce the comprehensive study provided for in 2001 in HB 2010. Only after the study was completed, and the State declined to implement any of its options, did the court find the State in contempt. Pet. App. 169a-170a. Even then, the court continued to adhere to the view that the State should be permitted to develop its own program. J.A. 90.

2. Throughout the course of this litigation, the district court's remedial orders have remained the same: The State must develop and appropriately fund a program for ELL education. See, *e.g.*, Pet. App. 100a (State "must establish clear rules and requirements that can be fulfilled and followed" by school districts); *id.* at 147a (State must choose "programs and practices" to implement a recognized ELL educational theory); J.A. 49 (State must "set specific standards for its programs," "identif[y] the requisite elements, features, [and] components for such programs," and "assess[] [the programs'] actual costs").

The district court's remedial orders were appropriate means of enforcing its judgment. "[F]ederal courts are not reduced to issuing injunctions against state officers and hoping for compliance. Once issued, an injunction may be enforced." *Hutto* v. *Finney*, 437 U.S. 678, 690-691 (1978). The court's requirement that the State develop and fund the ELL program of its choice is consistent with both the text and purpose of the EEOA, which requires that the State "take appropriate action to overcome language barriers that impede equal participation by students in its educational programs." 20 U.S.C. 1703(f). Once the court found a systemic failure to educate ELL students in Nogales that was caused by inadequacies in the statewide program, the court appropriately ordered the State to put a plan in place to ensure that ELL students receive the services needed to participate meaningfully in the educational system. That remedy was "essential," 20 U.S.C. 1712, because the EEOA violation arose from the State's failure to put in place the "practices, resources and personnel necessary" to implement a recognized theory of ELL education. *Castaneda*, 648 F.2d at 1010.[4]

The court found that a remedy against the State was necessary because the suit challenged the State's failure to develop ELL programs and funding for all school districts, including Nogales. The State did not challenge the original finding of a violation at the state level or the subsequent remedial orders entered against the State, apparently because it believed that developing and funding an ELL program only for Nogales would run afoul

[4] Petitioners' reliance (08-289 Br. 56, 59) on the remedial standards in 20 U.S.C. 1713 and the notice provision in 20 U.S.C. 1758 is misplaced; the former applies only to busing remedies, and the latter is limited to desegregation remedies.

of the Arizona Constitution's guarantee of "a general and uniform public school system." State Resp. C.A. Br. 60 (quoting Ariz. Const. Art. XI § 1(a)).

The district court's orders are faithful to the remedial principles set forth by this Court. They are directly "related to" the violation of federal law, *Milliken* v. *Bradley*, 433 U.S. 267, 280 (1977), because they are designed to ameliorate the deficiencies in Nogales caused by the State's failure to provide standards for class sizes, teacher training, instructional materials, and other key elements of an ELL program. The orders are also "remedial in nature," *ibid.*, because they ensure that ELL students will be afforded equal educational opportunity that they have been denied. See Pet. App. 156a ("Thousands of children * * * have now been impacted by the State's continued inadequate funding of ELL programs.").

The district court was respectful of "the interests of state and local authorities in managing their own affairs." *Milliken*, 433 U.S. at 281. The court recognized that "[t]he scope of federal injunctive relief against a state government must always be narrowly tailored to enforce federal constitutional and statutory law only." J.A. 390. It therefore allowed the State to "choose *any* legitimate * * * instructional method" so long as it "provide[d] sufficient funding to implement that method." Pet. App. 110a (emphasis added); see J.A. 39, 89-90. Indeed, petitioners have acknowledged that the district court "left it up to the Legislature to craft a program that is not arbitrary and capricious." Rule 60(b)(5) Mot. 8.

The funding aspect of the district court's remedial orders is consistent with this Court's decisions. The court did not order the State to spend any particular

amount of money on ELL education; it required only that ELL funding "shall bear a rational relationship to the actual funding needed to implement language acquisition programs in Arizona's schools." J.A. 44; see, *e.g.*, Pet. App. 110a, 150a, 180a. The requirement that the State provide an amount "adequate to fund" the ELL program of its choosing appropriately "protect[ed] the function of [local government] institutions" and permissibly "place[d] the responsibility for solutions to the problems * * * upon those who have themselves created the problems." *Missouri* v. *Jenkins*, 495 U.S. 33, 51-52 (1990).

3. At the time of petitioners' Rule 60(b)(5) motion, then, the district court had determined that the State was in violation of the EEOA and had reasonably exercised its equitable authority to require the State to develop and fund an ELL program of its choice. The State never appealed the original judgment or the ensuing remedial orders, Pet. App. 15a-18a, 20a, instead assuring the court that compliance was forthcoming. Some progress has been made toward compliance: the State enacted HB 2064, which charged a task force with developing instructional models to be utilized by school districts for ELL education and put in place a scheme for funding those programs. J.A. 89-90. But the State had not yet adopted and funded the models. See Pet. App. 61a, 68a. It was against that backdrop that petitioners sought to vacate the remedial orders in their entirety.

B. The Court Of Appeals Applied The Correct Standards Under Rule 60(b)(5)

1. Federal Rule of Civil Procedure 60(b)(5) authorizes modification of an institutional injunction when the party seeking modification demonstrates "a significant

change either in factual conditions or in law." *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992); see *Agostini* v. *Felton*, 521 U.S. 203, 215 (1997). Modification may be warranted when changed factual conditions "make compliance * * * substantially more onerous" or "prove[] [the decree] to be unworkable"; compliance "would be detrimental to the public interest"; or the court's remedial order has "become impermissible under federal law." *Rufo*, 502 U.S. at 384, 388. Rule 60(b)(5) is not, however, a mechanism to relitigate the original judgment. *Id.* at 391-392; see, *e.g.*, *System Fed'n No. 91* v. *Wright*, 364 U.S. 642, 647 (1961).

In assessing requests for modification of an institutional injunction, courts should utilize a "flexible approach." *Rufo*, 502 U.S. at 381; see *Frew* v. *Hawkins*, 540 U.S. 431, 441 (2004). But "it does not follow that a modification will be warranted in all circumstances." *Rufo*, 502 U.S. at 383; see *Frew*, 540 U.S. at 442. That determination is entrusted to the district court's discretion, *Agostini*, 521 U.S. at 238, and the party seeking modification bears the burden of establishing that it is warranted, *Rufo*, 502 U.S. at 383. Complete dissolution of an injunction ordinarily is warranted only when the moving party demonstrates that there has been "full and satisfactory compliance with the decree," *Freeman* v. *Pitts*, 503 U.S. 467, 491 (1992), that has been sustained "for a reasonable period of time," *Board of Educ.* v. *Dowell*, 498 U.S. 237, 248 (1991).

2. The court of appeals applied the foregoing principles in declining to vacate its remedial orders. Citing *Rufo* and *Agostini*, it recognized that the moving party has the burden to demonstrate "a significant change either in factual conditions or in law." Pet. App. 49a. It also recognized that the Rule 60(b)(5) standard is "flexi-

ble," Pet. App. 49a, and that the district court has discretion in deciding whether to modify its own decree, *id.* at 49a-50a.

The court of appeals correctly observed that it should not "retry the case" or "reexamine unappealed legal determinations," Pet. App. 49a, especially where, as here, the State never challenged the underlying judgment or any of the remedial orders, *id.* at 61a-62a. And the court properly accounted for this Court's federalism-based concerns, stating that it would scrutinize the district court's Rule 60(b)(5) decision "closely to make sure that the remedy protects the plaintiffs' federal constitutional and statutory rights but does not require more of state officials than is necessary to assure their compliance with federal law." *Id.* at 52a (internal quotation marks omitted).

3. Petitioners are mistaken in contending that the court of appeals applied an incorrect standard in reviewing the district court's Rule 60(b)(5) decision. The court did not resurrect the "grievous wrong" standard from *United States* v. *Swift & Co.*, 286 U.S. 106, 119 (1932). The court made no mention of *Swift*, instead appropriately relying on *Rufo* and *Agostini*. Further, the court's inquiry as to whether "the basic factual premises" of the orders "had been swept away" or there had been "some *change* in the legal landscape" (Pet. App. 63a) simply restated this Court's teaching that the moving party must show some change in the facts or the law, not simply that "it is no longer convenient to live with [the judgment's] terms." *Rufo*, 502 U.S. at 383. And the court's careful review of current conditions in Nogales (Pet. App. 63a-72a) makes clear that it was fully willing to grant relief if it was warranted.

Contrary to petitioners' suggestion (08-294 Pet. Br. 38-41), the court of appeals did not refuse to modify its orders simply because the State had neither appealed the original judgment nor supported the Rule 60(b)(5) motion. Instead, the court noted those facts in explaining that Rule 60(b)(5) relief is directed at changed circumstances, not arguments that were raised or could have been raised at the time of judgment. Pet. App. 51a-52a, 60a-62a. And the court made clear that it would defer to the view of state officials on the burdens of complying with the judgment if they "work[ed] out * * * a consistent position and approach." *Id.* at 55a.

There is, therefore, no basis to conclude that the court erected an "insurmountable hurdle" (08-289 Pet. Br. 37) to Rule 60(b)(5) relief. To the contrary, the court specifically contemplated that relief could be appropriate if the models contemplated in HB 2064 were implemented and appropriately funded. Pet. App. 90a.

C. The Court Of Appeals' Application Of The Rule 60(b)(5) Standards Was Correct

The court of appeals did not err in upholding the district court's denial of relief under Rule 60(b)(5), particularly given the arguments petitioners made and the nature of relief they requested. Petitioners contended: (1) that Title III of NCLB "preempts" the EEOA and makes the district court's orders "obsolete," Rule 60(b)(5) Mot. 2, 16; (2) that the State was not required to comply with the orders due to improvements in Nogales, *id.* at 3; and (3) that HB 2064 complied with the judgment, *id.* at 1. Petitioners asked that the remedial orders be "dissolve[d]" or deemed satisfied in their entirety on those grounds. *Id.* at 2. None of petitioners' arguments required that result.

1. Receipt of funds under Title III of NCLB does not itself demonstrate "appropriate action" under the EEOA

A State's receipt of federal funding under Title III of NCLB does not in itself demonstrate that the State is taking appropriate action to overcome language barriers under the EEOA. Nothing in Title III indicates an intent to displace entirely the EEOA, and there is no warrant for this Court to assume Congress had such an intent.

a. The EEOA and NCLB are fundamentally different, although complementary, statutory schemes. The EEOA is "an equality-based civil rights statute," Pet. App. 72a, that requires *all* States to "take appropriate action to overcome language barriers that impede equal participation by [their] students," 20 U.S.C. 1703(f). The EEOA focuses on ensuring that States provide "equal educational opportunity" to ELL students, 20 U.S.C. 1703, through programs and resources that are reasonably calculated to help them become proficient in English. Accordingly, EEOA litigation typically focuses on the adequacy of a State's programs, including factors such as class size, teacher training, time spent in classrooms, instructional materials, tutoring, and state oversight and funding. See, *e.g.*, *United States* v. *Texas*, 680 F.2d 356, 371 (5th Cir. 1982); *Keyes*, 576 F. Supp. at 1511-1519. The EEOA is enforced by individuals through a private right of action and by the Attorney General. 20 U.S.C. 1706, 1709.

NCLB, on the other hand, is a voluntary funding program that focuses on the overall academic improvement of disadvantaged students. Pet. App. 73a; see 20 U.S.C. 6301. Title III of NCLB authorizes federal grant funds to help States "ensure that children who are limited

English proficient * * * attain English proficiency, develop high levels of academic attainment in English, and meet the same challenging State academic content and student academic achievement standards as all children are expected to meet." 20 U.S.C. 6812(1).

No State is required to participate in Title III. 20 U.S.C. 6826(a). To receive funds, a State must submit a plan to the Secretary stating that it "will establish standards and objectives for raising the level of English proficiency," require school districts to measure students' progress using annual measurable achievement objectives (AMAOs), and hold school districts accountable if they do not meet the established standards. 20 U.S.C. 6823(b); see 20 U.S.C. 6823(f).

A State that receives Title III funding is required to follow through with processes described in its plan and report its progress to the Secretary. 20 U.S.C. 6843. But the Secretary does not decide whether the State's ELL programs are adequate. Instead, the *State* evaluates each school district's progress and requires the district to take remedial action if its students are not meeting the AMAOs established by the State. See 20 U.S.C. 6842(b) (remedial actions include requiring school district to develop improvement plan, modify curriculum, or replace educational personnel). DOE assists the State by monitoring the State's goals and progress and providing technical assistance upon request. 20 U.S.C. 6823(f).

The EEOA and Title III, then, function in distinct ways: the EEOA affords each student an actionable individual right to equal educational opportunity, while Title III establishes a voluntary funding arrangement under which the Secretary works with States to reach their own academic achievement goals.

b. Several features of Title III make clear that it is not a substitute for States' obligations under the EEOA.

First, participation in Title III is voluntary. Unlike the EEOA, which requires States to take action to provide students with equal educational opportunity, 20 U.S.C. 1703, NCLB does not require States to do anything, 20 U.S.C. 6821. Only if a State chooses to apply for funding under NCLB does the State incur the obligations to develop and submit a plan, set standards for student performance, monitor school districts' progress, take appropriate remedial action, and report its progress to DOE. See 20 U.S.C. 6821, 6823, 6825, 6842.

Even if a State accepts Title III funding, it is not required to serve all students, because each school district's participation in Title III is voluntary. In Arizona, for example, nearly 5000 ELL students were not served by Title III programs during the 2007-2008 school year. *Consolidated State Performance Report for State Formula Grant Programs Under the Elementary and Secondary Education Act As Amended By the No Child Left Behind Act of 2001, School Year 2007-2008: Arizona* 48-50 (2008) (*CSPR*). The State's Title III standards and objectives apply only to those students served under Title III. See 20 U.S.C. 6826, 6842.

Second, Title III "compliance" means adherence to the statute's process-oriented requirements. Title III does not impose specific curricula or "delineate[] what programs states must implement." 08-289 Pet. Br. 56. To the contrary, the Secretary is expressly prohibited from "mandat[ing], direct[ing], review[ing], or control-[ling] * * * content [and] curriculum." 20 U.S.C. 7906(b); see 20 U.S.C. 1232a, 3403(b), 6849. Accordingly, the Secretary's approval of a State's plan does not reflect a judgment about the adequacy of the State's

ELL programs; instead, it shows that the plan "meets the [statutory] requirements." 20 U.S.C. 6823(c). Indeed, a State's plan simply does not provide sufficient detail about its ELL program to make a determination as to its adequacy for purposes of the EEOA. See, *e.g.*, State of Arizona, *Consolidated State Application* 61-63 (2002) (ELL portion of state plan).

Nor does a State's continued receipt of Title III funding establish that the State is offering equal educational opportunity. A State may continue to receive Title III funding even if particular school districts are not meeting the State's AMAOs, so long as it continues to work cooperatively with DOE and to "substantially" comply with its statutory obligations. 20 U.S.C. 1234c. Arizona's Title III participation is illustrative: During the 2007-2008 school year, 147 of the 217 school districts in Arizona failed to meet the AMAOs the State had set for ELL students; 127 school districts had not made AMAOs for two consecutive years, and 34 school districts had not made AMAOs for four consecutive years. See *CSPR* 55; see also Pet. App. 39a. Those facts, however, do not provide a basis for ending Title III funding.

Third, Title III places the responsibility for designing and assessing ELL programs on the State. The State set its own performance standards, determines how to measure student progress, reviews testing results, and requires school districts to make changes if they fail to meet state standards. 20 U.S.C. 6823, 6842; see 20 U.S.C. 6311(b)(2) and (3). To conclude that a State has taken appropriate action under the EEOA to afford equal opportunity to ELL students merely by deciding that it is meeting its own standards would be anomalous, especially because it would tie the *federal*

right under the EEOA to varying *state* performance standards.

Fourth, the EEOA and Title III have very different enforcement schemes. The EEOA is enforced through private lawsuits brought by individuals or the Attorney General. 20 U.S.C. 1706. The Title III provisions at issue are administered by the Secretary, and they contain no mechanism—administrative or judicial—for individuals to seek relief. See, *e.g.*, *Newark Parents Ass'n* v. *Newark Pub. Sch.*, 547 F.3d 199, 208-214 (3d Cir. 2008) (collecting cases).[5]

Finally, Title III does not mention the EEOA, much less declare that compliance with its requirements satisfies a State's obligations "to take appropriate action to overcome language barriers." 20 U.S.C. 1703(f). To the contrary, Title III provides that "[n]othing in this part shall be construed in a manner inconsistent with any Federal law guaranteeing a civil right." 20 U.S.C. 6847; see 20 U.S.C. 7914(a). The EEOA is just such a law, for it guarantees equal educational opportunity without regard to race, color, sex, or national origin. 20 U.S.C. 1703. Title III's savings clause—which petitioners do not even mention—makes clear that Title III does not supersede the EEOA.

---

[5] Petitioners are mistaken in contending (08-289 Pet. Br. 56 n.23) that individual students may seek relief from the Secretary "when their ELL programs are inadequate." 20 U.S.C. 7844(a)(3)(C) requires *States*—not the federal government—to adopt procedures for the receipt and resolution of complaints alleging "violations of law in the administration of the programs." Although there are regulations authorizing the Secretary to review a State's resolution of a complaint, 34 C.F.R. 299.10-299.11, they do not apply to the Title III provisions at issue here, 34 C.F.R. 299.10(b).

c. In petitioners' view, receipt of federal funding under Title III is a complete defense to liability under the EEOA. See, *e.g.*, 08-294 Pet. Br. 57 (no EEOA remedy "where a State's NCLB plan is approved by the Department of Education"). This amounts to an argument for repeal by implication, which could be found only if the two statutes are irreconcilable. Pet. App. 77a (citing *Morton* v. *Mancari*, 417 U.S. 535, 549-550 (1974)). The EEOA and Title III are not irreconcilable, as confirmed by the savings clause in Title III. And the district court's remedial orders permit the State to choose its own program for EEOA compliance, just as Title III allows the State to set its own standards and targets for student performance, see 20 U.S.C. 6823(b)(2).

Even though Title III participation is not a complete defense under the EEOA, whether a State is reaching its own goals under Title III may be relevant in an EEOA suit. For example, data collected by the State as part of its assessment of student progress may be useful in judging whether a State's ELL program results in equal educational opportunity under the third step of the *Castaneda* inquiry. See 648 F.2d at 1009-1010; see also Pet. App. 80a-81a & n.46. But petitioners did not make that type of argument below. Instead, they insisted that mere participation in Title III justifies dissolution of the remedial orders. The district court appropriately rejected that proposition.

2. Asserted changed circumstances in Nogales did not compel dissolution of the orders

Petitioners contend (08-289 Pet. Br. 43-45; 08-294 Pet. Br. 45) that injunctive relief is no longer warranted because ELL programs in Nogales have improved and overall state educational funding has increased. The

district court disagreed, and that determination was not an abuse of discretion.

a. Petitioners' claims of educational improvements in Nogales did not justify dissolving the remedial orders. The EEOA places obligations on both state and local educational agencies. 20 U.S.C. 1703(f), 1720(a). Even if local personnel are responsible for the day-to-day implementation of the State's ELL programs, the State may not abdicate its oversight and funding obligations to them, at least where, as here, state law assigns such responsibilities to the State. See, *e.g.*, *Gomez*, 811 F.2d at 1043; *Idaho Migrant Council* v. *Board of Educ.*, 647 F.2d 69, 71 (9th Cir. 1981).

In this case, the State repeatedly acknowledged that, regardless of what actions individual school districts are taking, it has a responsibility under the EEOA to develop and fund "an appropriate, state-wide system of English Acquisition Programs." Defs.' Resp. 1, 6; see Pet. App. 148a-150a. But the State has not yet fulfilled that responsibility. Pet. App. 110a-116a. Until the State "follow[s] through with practices [and] resources" to transform its theory of ELL instruction into reality, it has not taken appropriate action under the EEOA, and modification of the remedial orders is not warranted. *Castaneda*, 648 F.2d at 1010. The EEOA requires States to "*take* appropriate action," 20 U.S.C. 1703(f) (emphasis added), not to forgo action in the hope that conditions will improve.

Contrary to petitioners' contention (08-294 Pet. Br. 45), the fact that there had been some improvements in Nogales with regard to six specific deficiencies identified by the district court in 2000 did not mean that the State itself was fulfilling the programmatic and oversight obligations under the EEOA that have been the

subject of this case from the outset. The district court concluded that local improvements, which "have been made largely as a result of [Nogales's] efforts alone," are "fleeting at best," because the State has not provided "clear rules and requirements" for school districts to "fulfill[] and follow[]" in achieving lasting results. Pet. App. 100a. EEOA compliance does not mean merely remedying the six deficiencies that were symptomatic of the State's failure to provide for appropriate ELL education in Nogales; it means putting in place a statewide program that guarantees equal opportunity to ELL students. *Id.* at 111a.

In any event, petitioners are mistaken in suggesting that ELL education in Nogales had improved so dramatically that the flaws in the state program were no longer of any consequence to Nogales. For example, ELL students in Nogales required an average of four to five years of sheltered English immersion to become proficient in English, Pet. App. 41a, yet state law sets a target of one year for ELL students to become proficient in English, Ariz. Rev. Stat. Ann. § 15-752 (West 1991), and HB 2064 cuts off funding for most ELL education after two years, Pet. App. 22a-23a. State performance data reflected that ELL students in Nogales continued to perform markedly worse than other students, especially at the high-school level. *Id.* at 39a, 66a ("the *majority* of ELL tenth graders fail to meet state achievement standards while the majority of native English speakers pass"). In light of the "persistent achievement gaps" remaining in Nogales, *id.* at 66a—which petitioners' own experts described as "not acceptable," J.A. 193-195—the district court acted within its discretion in continuing to require the State to adopt and rationally fund an ELL program.

b. The district court likewise did not abuse its discretion in rejecting petitioners' assertion (08-294 Pet. Br. 46) that Nogales has ample funding for its ELL programs. Determining whether funding is adequate first requires the State to define the elements of its ELL program, such as teacher training, class size, and time spent on classroom instruction, and then provide for the funding necessary to put those standards into practice. Pet. App. 110a-111a. At the time of the Rule 60(b)(5) motion, the State was still "endeavoring to establish appropriate standards and goals for all students in Arizona." *Id.* at 100a. In the absence of those standards, it would have been premature to deem any particular amount of funding sufficient.

By all accounts, moreover, Nogales continued to face "significant resource constraints." Pet. App. 36a. The State's own ELL model has long assumed that ELL programs require their own funding, "*on top* of base level support," because of the additional burdens they place on school districts. *Id.* at 69a. Yet the State has never funded ELL programs at a rate approaching their actual cost. *Id.* at 44a. The State's per-student allocation in HB 2064, *id.* at 43a, was less than what a 1987 cost study had estimated to be adequate, *id.* at 149a, and less than one-third of the amount Nogales was actually spending on its ELL programs, *id.* at 41a-42a. Indeed, that allocation "d[id] not appear to have been set with regard to any specific program costs, known or estimated." *Id.* at 32a.

As a result, Nogales was able to fund basic ELL education only by "seeking grants, diverting state base level funding away from other purposes, and passing county-level budget overrides." Pet. App. 41a. None of those sources provides a sustainable basis for successful ELL

programs. Federal grant funds may only be used to supplement the State's ELL programs, not to fund them in the first instance. See pp. 31-32, *infra*. Budget overrides provide only a few percent of the necessary funds and are limited by the local population's willingness to assume that burden. Pet. App. 42a. And diverting base-level funding to ELL programs denies other students the amounts the State has deemed necessary to "ensure that [they] receive[] a basic education," *id.* at 122a, and creates resource disparities that may be unacceptable under the state constitution's uniformity guarantee, Ariz. Const. Art. XI, § 1(a). See Pet. App. 70a.

Even with those additional funding sources, resource constraints limited the success of Nogales's ELL program. The school district was unable to attract and retain teachers because it could not afford to "pay market rate salaries," which made it difficult to reduce class sizes. Pet. App. 66a. And it could not afford to hire qualified teachers aides, *ibid.*, even though local educational officials considered them "essential," J.A. 225.

Thus, at the time of the Rule 60(b)(5) motion, the State had not determined the cost of funding a comprehensive ELL program, and "a fundamental mismatch" remained "between the ELL costs [Nogales] require[d]" for its existing programs "and the funds provided for that specific purpose." Pet. App. 44a. It was therefore not an abuse of discretion for the district court to keep the remedial orders in place.

3. HB 2064 does not fully satisfy the judgment

A primary argument petitioners made to the district court was that HB 2064 "complies in all material respects with the judgment and orders" of the district court. Rule 60(b)(5) Mot. 3. Yet petitioners make little

mention of HB 2064 before this Court. It is important to examine HB 2064, however, both because it represents the State's chosen method of meeting its EEOA obligations, and because it now governs the structure and funding of ELL programs statewide. Pet. App. 53a, 82a.

a. HB 2064 was enacted to provide "a comprehensive, efficient and cost-effective program of developing research based models of structured English immersion that comply with all state and federal laws" and of "funding the incremental costs of [those] research based models." Pet. App. 332a. It created a task force within the state Department of Education to develop models for school districts to use for ELL education. *Id.* at 282a. Those models would provide detailed standards for ELL programs based on the size and location of the school and the number of its ELL students. *Id.* at 282a-283a. Once those models were created, each school district would determine the amount of funding required to implement the model and request funds from the State. *Id.* at 284a.

State funding for ELL programming would then be available from three sources. First, each school district would receive incremental funding of $430 for each ELL student, for up to two years per student. Pet. App. 333a-334a.[6] If that funding is not adequate, then the district could seek additional funds from the statewide "structured English immersion fund"—but that fund was also limited to two years per student. *Id.* at 22a, 284a-286a. If students remain in ELL programs beyond two years, funding is available from a statewide compensatory education fund. *Id.* at 304a-306a. But that funding can only

[6] This provision would become effective only if the district court approved HB 2064 as "appropriate action" under the EEOA. Pet. App. 333a-334a.

be used for instruction outside of the normal class day, such as "individual or small group instruction, extended day classes, summer school or intersession school." *Id.* at 306a. Further, HB 2064 provides that any request for money from the two supplemental funds must be reduced by funds received under certain federal grant programs, including Title III of NCLB. *Id.* at 284a-285a, 304a-305a.

b. HB 2064 does not demonstrate full compliance with the judgment, although it does put the State on a path to compliance.

There are two key flaws in HB 2064 that the courts below found prevented it from satisfying the State's obligation to take "appropriate action" under the EEOA. First, HB 2064 cuts off funding for structured English immersion after a student has participated in that program for two years, regardless of whether the student has become proficient in English. Pet. App. 22a-23a. The lower courts reasonably concluded that that limitation was problematic in light of the uncontroverted evidence in the record that many students are unable to become proficient in English after only two years. *Id.* at 83a-85a. As the district court noted, "[o]n average, it takes ELL students in [Nogales] four to five years" to become proficient in English, and petitioners "did not present any evidence that two years is a sufficient amount of time * * * to attain English language proficiency." *Id.* at 108a-109a. The compensatory education fund does not provide an adequate backstop for students who require more than two years of ELL instruction, because that fund cannot be used for ordinary classroom instruction. *Id.* at 107a. It was not an abuse of discretion to conclude that a statewide system that arbitrarily stops funding ELL education after two years is not rea-

sonably calculated to fulfill the State's obligation to ensure that all ELL students have an equal opportunity to learn consistent with the EEOA.[7]

Second, both the structured English immersion fund and the compensatory education fund contain offset provisions that clearly violate federal law. Under HB 2064, after a school district calculates the money it needs from the two statewide funds, it must subtract from that amount money it receives from four federal grant programs—Title I, Title II-A, Title III, and Title VII of ESEA, as amended by NCLB. See Pet. App. 284a-285a. Several provisions of ESEA prohibit such use of federal funds to meet state obligations. Title I (20 U.S.C. 6321(b)), Title II-A (20 U.S.C. 6623(b)), and Title III (20 U.S.C. 6825(g)) each contain "supplement, not supplant" provisions that prohibit the use of federal grant funds to take the place of state funds that otherwise would have been available. Further, 20 U.S.C. 7902 specifically prohibits a State from taking into consideration payments under any ESEA program (with the exception of Title VII under certain circumstances) in determining the amount of state funding to allocate to a school district

---

[7] Title I of ESEA generally requires a student to be assessed in reading or language arts using a test written in English after the student has attended school in the United States for three or more consecutive years. 20 U.S.C. 6311(b)(3)(C)(x). That process does not, however, reflect the view that all students will be proficient in English after three years. Title I permits school districts to decide, on a case-by-case basis, that some students should be tested in their native language for up to five years, *ibid.*, and it authorizes school districts to make certain accommodations when testing students with limited English proficiency, 20 U.S.C. 6311(b)(3)(C)(ix)(III).

for public education.[8] Because HB 2064's offset provisions violate federal law, that aspect of the statute's funding scheme must be eliminated before HB 2064 could constitute an appropriate solution under the EEOA.

c. Although the mere passage of HB 2064 does not fully satisfy the judgment, HB 2064 provides a path to compliance, because it provides mechanisms for the State to define its own ELL program and for school districts to implement that program. See Pet. App. 90a; J.A. 90. The first step toward compliance has already been taken, because the task force has developed the models for ELL education, which include standards for variables such as class size, student-teacher ratios, instructional materials, and tutoring. See *Structured English Immersion Models of the Arizona English Language Learners Task Force* (Apr. 10, 2008) <http://www.ade.state.az.us/ELLTaskForce/2008/SEIModels04-10-08.pdf>. Together with the programmatic changes put in place by the consent decree, see note 2, *supra*, they set out a statewide program for ELL education.

The "only steps remaining" are for "the school districts to complete the budget forms and submit them" to the legislature, and for the legislature to appropriate funds. J.A. 90. If those steps are taken, and the State cures the two key flaws in HB 2064 described above, then the district court should deem the judgment satisfied. See Pet. App. 90a. But because petitioners sought dissolution of the remedial orders before the State corrected those flaws and put the system envisioned by HB

---

[8] DOE explained how the offset provisions violate federal law in detail in a letter to the Superintendent. See State Resp. Br. App. 1-4; see also Pet. App. 82a, 113a-114a.

2064 in place, the district court did not abuse its discretion in denying that relief at that time.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General[*]
MICHAEL F. HERTZ
LORETTA KING
Acting Assistant Attorneys General
EDWIN S. KNEEDLER
Deputy Solicitor General
NICOLE A. SAHARSKY
Assistant to the Solicitor General
MARK B. STERN
DENNIS J. DIMSEY
ANGELA M. MILLER
Attorneys

PHILIP H. ROSENFELT
Deputy General Counsel
SUSAN E. CRAIG
Assistant General Counsel
RONALD PETRACCA
Attorney
Department of Education

MARCH 2009

---

[*] The Solicitor General is recused in this case.

AMICUS CURIAE BRIEF

121

12

9

FILED
FEB 26 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 08-294
(consolidated with No. 08-289)

IN THE

Supreme Court of the United States

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES and PRESIDENT OF THE ARIZONA SENATE,

PETITIONERS,

v.

MIRIAM FLORES, individually and as parent of Miriam Flores, minor child; ROSA RZESLAWSKI, individually and as parent of Mario Rzeslawski, minor child; STATE OF ARIZONA and the ARIZONA STATE BOARD OF EDUCATION, and its members in their official capacities,

RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF ON BEHALF OF THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL AND CERTAIN INDIVIDUAL STATE LEGISLATORS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

SETH L. COOPER
AMERICAN LEGISLATIVE EXCHANGE COUNCIL
1101 Vermont Ave. NW, Fl. 11
Washington, DC 20005
(202) 742-8524

ROBERT O'BRIEN
Counsel of Record
JONATHAN E. PHILLIPS
ARENT FOX LLP
555 West Fifth St., Fl. 48
Los Angeles, CA 90013-1065
(213) 443-7512

Counsel for Amicus Curiae

February 26, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

OOTH 4 CVTQA

8443 A 53

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. Long-term Court Interference Disrupts the Ability of State Legislators to Make Vital Policy Decisions and Judgment Calls in Response to Changing Circumstances 6

A. Legislatures Require Flexibility to Meet Changing Current Circumstances as Well as Future Challenges 7

B. Fundamental and Sound Principles of Federalism Require That Injunctions and Consent Decrees Be Managed in Such a Way as to Avoid Subverting The Democratic and Legilsative Processes 11

C. The Ninth Circuit's Decision Ignores this Court's Long-Standing Precedent and Replaces it with a Standard That Flies in the Face of Democratic Accountability, Separation of Powers, and Principles of Federalism 14

II. The Ninth Circuit Has Allowed the District Court to Co-opt the State Legislative Power of Appropriations in Order to Assert De Facto Control Over Arizona's Education System 15

A. Exercise of Appropriations Power Often Involves Complex, Contentious Trade-Offs that Belong Squarely in the Legislative Arena. 17

B. Frustrated Political Factions Can Improperly Use Institutional Reform Litigation to Circumvent the Legislative Appropriations Process. 19

C. The Ninth Circuit's Decision Risks Subjecting State Legislatures to an Increasing Number of District Court Injunctions Requiring Earmarks 22

III. Public Education Is Properly the Domain of State Policymakers—Not Federal Courts 26

A. States Must Balance Competing Interests While Managing Interconnected and Ever-evolving Educational Challenges 28

1. Without Proper Accountability, More Money Does Not Result in Improved ELL Services 29

2. The Ninth Circuit's Decision Disregards the Congressional Mandate for Accountability and Standards, Insisting Instead that Earmarked Spending Is the Only "Appropriate Action." 32

B. Reversal Is Necessary to Restore Control Over the Education of Arizona's Youth to Arizona's Democratically Elected Leaders 34

IV. Petitioners Have Standing to Appeal the Rulings of the Lower Court in this Matters 36

CONCLUSION 38

Appendix 1a

TABLE OF AUTHORITIES

Cases **Page(s)**

Federal Cases

Alexander v. Britt,
89 F.3d 194, (4th Cir. 1996) 15

Bowsher v. Synar,
478 U.S. 714, (1986) 16

Brown v. Board of Education,
347 U.S. 483, (1954) 26

Ensley Branch, NAACP v. Siebels,
31 F.3d 1548, (11th Cir. 2003) 15

Evans v. City of Chicago,
10 F.3d 474, (7th Cir. 1993) 15

Flores v. Arizona,
516 F.3d 1140, (9th Cir. 2008) 36

Freeman v. Pitts,
503 U.S. 467, (1992) 27, 32

Frew v. Hawkins,
540 U.S. 431, (2004) 7, 11, 12, 13, 23, 41

Grier v. Goetz,
2006 U.S. Dist. LEXIS 11211
(M.D. Tenn., Mar. 15, 2006)..... 24

Grier v. Goetz,
402 F.Sup.2d 871 (M.D. Tenn. 2005)..... 24

Heath v. DeCourcy,
888 F.2d 1105, (6th Cir. 1989) 12, 15

In re Detroit Dealers Ass'n,
84 F.3d 787, (6th Cir. 1996) 15

Labor/Community Strategy Ctr. v. L.A. County Metro. Transp. Auth., 263 F.3d 1041 (9th Cir. 2001), cert. denied, 535 U.S. 951 (2002) 25

League of United Latin American Citizens, Council No. 4434 v. Clements, 999 F.2d 831, (5th Cir. 1993) 13

Missouri v. Jenkins, 515 U.S. 70, (1995) 19, 27

New York v. United States, 505 U.S. 144, (1992) 13

O'Sullivan v. City of Chicago, 396 F.3d 843, (7th Cir. 2005) 15

People Who Care v. Rockford Board of Educ. School Dist. No. 205, 961 F.2d 1335, (7th Cir. 1992) 13

Raines v. Byrd, 521 U.S. 811, ... 36, 37

Reynolds v. McInnes, 338 F.3d 1221, (11th Cir. 2003) 15

Rosen v. Goetz, 129 Fed. Appx. 167 (April, 12, 2005) 24

Rosen v. Goetz, 410 F.3d 919 (6th Cir. 2005) 24

Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, (1992) 7, 10, 11, 12, 17, 18, 28, 34, 35

San Antonio Independent Sch. Dist. v. Rodriguez, 411 U.S. 1, 58 (1973) 27, 30

Stone v. State of Mississippi, 101 U.S. 814, (1879) 13

Warth v. Seldin,
422 U.S. 490, ... 37

State Cases

Claremont Sch. Dist. v. Governor,
147 N.H. 499, (N.H. 2002) 32

Hunter v. State,
177 Vt. 339, 865 A.2d 381 (Vt. 2004)..... 16

State ex rel. Norfolk Beet-Sugar Co. v. Moore,
50 Neb. 88, 69 N.W. 373 (Neb. 1896)..... 16

Statutes and Rules

Federal Rule of Civil Procedure 60(b)(5) 14

20 U.S.C. §§ 1400..... 24

20 U.S.C. §§ 6301..... 32

U.S. Const. art I..... 16

Other Authorities

Andrew T. LeFevre, *Report Card on American Education: A State-by-State Analysis* (15t ed.) 132-133, American Legislative Exchange Council (Feb. 2009) 30

Benjamin Barr, *The States' Struggle for Sovereignty: The Consequences of Federal Mandates*, ALEC Policy Forum (Sept. 2008)..... 8

Brad Haynes, "Tennessee's Democratic Governor Weighs Rejecting Stimulus Funds," The Wall Street Journal (Feb. 24, 2009) 21

Dan Lips, Shanea J. Watkins, and John Fleming, *Does Spending More on Education Improve Academic Achievement?* 6, The Heritage Foundation (Sept. 8, 2008) 30

Frederick Hess, "Adequacy Judgments and School Reform," *in* School Money Trials 185 (Martin West, ed., Brookings Institution Press) (2007) 31

Government Accountability Office, *State and Local Governments: Growing Fiscal Challenges Will Emerge during the Next 10 Years* 1 (Washington, DC: GAO, January, 2008 23

Jeremey A. Rabkin & Neal E. Devins, *Averting Government by Consent Decree: Constitutional Limitations on Settlements with the Federal Government*, 40 Stan. L. Rev. 203, 271 (1987)... 19

Jordan Rau, Evan Halper and Patrick McGreevy, "With budget stalemate over, next move is up to California voters," Los Angeles Times (Feb. 20, 2009) 9

Matthew G. Springer and James W. Guthrie, "Adequacy's Politicization of the School Finance Legal Process," *in* School Money Trials 121 (Martin West, ed., Brookings Institution Press) (2007) 31

Michael Rothfield, "Arnold Schwarzenegger, Jerry Brown will ask U.S. to end oversight of California prison," Los Angeles Times (Jan. 28, 2009). 9

National Governors Association and National Association of State Budget Officers, *The Fiscal Survey of States* 8 (Dec. 2008)..... 22

Phillip Matier and Andrew Ross, "Plush hospitals for state's felons," San Francisco Chronicle (Jan. 12, 2009). 9

Ross Sandler & David Schoenbrod, The Supreme Court, Democracy and Institutional Reform Litigation, 49 N.Y.L. Sch. L. Rev. 915, 923-924 (2005).. 13, 20

Stanley J. Czerwinski, Government Accountability Office, *State and Local Fiscal Challenges: Rising Health Care Costs Drive Long-term and Immediate Pressures*, 1 (Washington, DC: GAO, January, 2008) 23

U.S. Chamber of Commerce, *Leaders and Laggards: A State-by-State Report Card on Educational Effectiveness* 7 (Feb. 2007) 30

INTEREST OF AMICUS CURIAE[1]

The American Legislative Exchange Council (ALEC) is the nation's largest non-partisan individual membership association of state legislators. ALEC has approximately 2,000 members in state legislatures across the United States. It serves to advance Jeffersonian principles of free markets, limited government, federalism, and individual liberty. ALEC has a number of interests in this litigation, as reflected in its official policies and publications.

ALEC's *Resolution on the Federal Consent Decree Fairness Act* (2006) sets forth ALEC's firm belief "that federal consent decrees [should be] narrowly drafted, limited in duration, and respectful of state and local interests and policy judgments." The *Resolution* is included in its entirety in Appendix.

ALEC's *Education Principles* state its mission concerning public education: "To promote excellence in the nation's educational system by advocating education reform policies that promote parental choice and school accountability, consistent with Jeffersonian principles of free markets and federalism." ALEC members hold leadership positions in state Senate and House chambers, as well as State legislative committees for education, education finance and appropriations. These

---

[1] In accordance with Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel has made a monetary contribution to the preparation or submission of this brief. In accordance with Rule 37.3(a), *amicus* states that all parties consented to the filing of this brief.

legislators must fulfill state constitutional obligations to provide for a public education and a determine how federal legal requirements shall be satisfied.

ALEC supports the No Child Left Behind Act (NCLB). ALEC's *Resolution Supporting the Principles of No Child Left Behind* (2006) reaffirms "that every child be afforded equal opportunity to a quality education regardless of race, creed or background, as recognized in *Brown v. Board of Education* (1954)." It recognizes that "the No Child Left Behind Act fundamentally changes the focus of federal government resources from a system-based focus to a child-based focus," and that "proficiency for all students and closure of the achievement gap, focused on math, science and reading, is fundamentally linked to overall reform of our system of public education through a strong system of accountability and transparency and built on state standards."

Joining with ALEC as *amicus* are the following twenty individual state legislators, all of whom share ALEC's concerns (as expressed in this brief) with the risks inherent in the Ninth Circuit's "inflexible standard" for modification of injunctions and consent decrees:

Delegate William J. Howell
Speaker of the Virginia House of Delegates
2009 National Chairman, American Legislative Exchange Council

Representative Liston Barfield
Member, House Ways & Means Committee
South Carolina House of Representatives

Senator Jim Buck
Indiana Senate

The Honorable Bill G. Carter
Former Representative (1983-2003)
Texas House of Representatives

Representative Stanley Cox
Missouri House of Representatives

Senator W. Edward Goodall, Jr.
Member, Senate Education Committee
Member, Senate Finance Committee
North Carolina Senate

Representative William A. Hamzy
Connecticut House of Representatives

Senator Owen Johnson
Former Chair, Senate Finance Committee (2003-08)
New York Senate

Representative Wes Keller
Member, Education Committee
Alaska House of Representatives

Senator Robert J. Letourneau
Senate Education Committee
New Hampshire Senate

Representative Susan Lynn
Chair, House Government Operations Committee
Tennessee General Assembly

Delegate W. Anthony McConkey
Maryland House of Delegates

Representative Michael R. O'Neal
Speaker of the Kansas House of Representatives
Former Chair, Kansas House Education Committee

Representative Beverly Rodeschin
Member, House Finance Committee
New Hampshire House of Representatives

Senator Nancy Spence
Member, Senate Education Committee
Colorado Senate

Representative Scott Suder
Former Member, Wisconsin Joint Finance Committee
Wisconsin House of Representatives

Representative Kim Thatcher
Member, House Education Committee
Oregon House of Representatives

Representative Jordan G. Ulery
House Ways & Means Committee
New Hampshire House of Representatives

Delegate Ronald N. Walters
West Virginia House of Delegates

Representative Fran Wendelboe
Member, House Finance Committee
New Hampshire House of Representatives

SUMMARY OF ARGUMENT

This institutional reform case, commenced over a decade ago, has embroiled the federal courts in a policy dispute over how Arizona should provide education to English language learners (ELL). The case started as a class action by parents and students against Nogales Unified School District for failure to take "appropriate action" under the Equal Educational Opportunity Act (EEOA) to overcome students' language barriers and provide access to equal education. However, through subsequent decisions of the District Court and the Ninth Circuit – decisions that intrude on the legislative and appropriations power of the Arizona legislature – the case has spun out of control and is now interfering with the Arizona legislature's ability to improve ELL education statewide.

ALEC respectfully urges the Court to reverse the Ninth Circuit and District Court rulings for the following reasons:

1. The District Court's long-term interference with the state legislative process – which has now been approved by the Ninth Circuit – disrupts the ability of the Arizona legislature to make vital policy decisions regarding ELL education in response to ever-changing circumstances and future challenges. Such a result is contrary to sound principles of federalism, separation of powers, and democratic accountability.

2. The Ninth Circuit has improperly allowed the District Court to co-opt the Arizona legislature's appropriations power in order to assert de facto control over Arizona's school system. The District Court's intrusion into the appropriations process has

severe and broad ramifications. It substantially interferes with the legislature's ability to utilize appropriations as a means of effectuating necessary legislative compromises. Even more troubling, the implementation of the ruling at issue has enabled a particular political faction to circumvent the appropriations process entirely, and instead pursue its political agenda through the federal courts.

3. The Ninth Circuit's ruling ignores this Court's long-standing recognition that public education is properly the domain of state and local policymakers. By affirming the District Court's insistence on absolute funding increases instead of the more balanced and effective use of performance standards and accountability, as set forth in NCLB, the Ninth Circuit has placed at risk the ability of Arizona to best educate its youth—including its ELL students.

ARGUMENT

For the reasons discussed below, ALEC respectfully urges the Court to reverse the lower courts' rulings, and by so doing vindicate principles of federalism, separation of powers, and democratic accountability, and ultimately restore control over Arizona's educational system to the state and local authorities best suited to educate Arizona's youth.

I. Long-term Court Interference Disrupts the Ability of State Legislators to Make Vital Policy Decisions and Judgment Calls in Response to Changing Circumstances.

"Citizens are entitled to elect state legislators and other leaders to make policy decisions and do the

business of governing." This fundamental democratic principle, set forth in ALEC's *Resolution on the Federal Consent Decree Fairness Act* (2006) (*"Resolution"*) (included in the attached Appendix), is threatened where, as is the case here, "state and local officials... inherit overbroad or outdated consent decrees that limit their ability to respond to the priorities and concerns of their constituents." *Id.*, 1a.

As such, ALEC agrees with this Court's concern in *Frew* that consent decrees may "improperly deprive future officials of their designated legislative and executive powers," leading to "federal court oversight of state programs for long periods of time even absent an ongoing violation of federal law." *Frew v. Hawkins*, 540 U.S. 431, 441 (2004). As reflected in the *Resolution*, ALEC believes that such decrees should be "narrowly drafted, limited in duration, and respectful of state and local interests and policy judgments." *Resolution*, App. 1a; *see also Frew*, 540 U.S. at 441-442 (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 392 n.14 (1992)) ("'[P]rinciples of federalism and simple common sense require the [district] court to give significant weight to the views of government officials."). As discussed below, ALEC's position is consistent with this Court's recent decisions regarding institutional reform litigation, and consistent with sound public policy necessary for effective state and local government.

A. Legislatures Require Flexibility to Meet Changing Current Circumstances as Well as Future Challenges.

Legislation does not occur in a vacuum. To the contrary, legislatures are charged with continually

reassessing the needs of their state's citizenry and evaluating the best ways in which to allocate resources to keep pace with changing circumstances. "[A] state...depends upon successor officials, both elected and appointed, to bring new insights and solutions to problems of allocating revenues and resources." *Frew*, 540 U.S. at 442. Were this not the case, the legislative branch would be largely superfluous, as the executive and judicial branches could together ensure that existing laws are enforced and legislative priorities met. Such marginalization of the legislative branch would be completely inconsistent with principles of federalism, separation of powers, and democratic accountability of state and local governments.

In order to properly fulfill their duties, state legislatures must frequently reassess how best to meet both future and existing challenges, and must retain sufficient flexibility to adjust legislative priorities in light of changing circumstances. As a recent article published by ALEC points out (in the context of federally-mandated spending programs), "[c]arefully designed local programs specifically tailored to solve community problems should not be displaced in favor of one-size-fits-all federal formulas."[2] In other words, flexibility to "specifically tailor" programs best suited to the needs of state and local governments must be protected in order to preserve the proper role of the legislature.

When legislative flexibility is impeded – as it too often is under consent decrees and court-ordered

---

[2] Benjamin Barr, *The States' Struggle for Sovereignty: The Consequences of Federal Mandates*, ALEC Policy Forum (Sept. 2008), available at http://www.alec.org/am/pdf/apf/apf_federal_mandates.pdf.

injunctions – there are both immediate and long-term ramifications.

A recent example highlights the immediate risks inherent when legislative flexibility is impeded by injunctions or consent decrees. California Governor Arnold Schwarzenegger and Attorney General Jerry Brown recently sought relief from a district court judge who had seized control of the prison healthcare system three years ago. Apparently, the court-appointed receiver approved an $8-billion plan to renovate prison healthcare clinics.[3] Under this plan, seven "holistic" facilities would be built, each roughly the size of 10 Wal-Mart stores, containing amenities such as "[a]erobics and yoga classes, workout rooms and open-air courtyards."[4] In response to complaints about such lavish spending, the federal receivership's explanation was that these were "mental health treatments already mandated by the courts." *Id.*

Meanwhile, California's legislature was in the midst of a months-long battle to resolve a budget crisis that threatened to cripple the state's ability to operate. The state legislature only recently reached an agreement to close a budget gap exceeding $41 billion.[5] Mere common sense dictates that today's

---

[3] Michael Rothfield, "Arnold Schwarzenegger, Jerry Brown will ask U.S. to end oversight of California prison," Los Angeles Times (Jan. 28, 2009) available at http://www.latimes.com/news/local/la-me-prisons28-2009jan28,0,2645570.story.

[4] Phillip Matier and Andrew Ross, "Plush hospitals for state's felons," San Francisco Chronicle (Jan. 12, 2009) available at http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/01/12/BAN9156U9N.DTL.

[5] Jordan Rau, Evan Halper and Patrick McGreevy, "With budget stalemate over, next move is up to California voters," Los Angeles Times (Feb. 20, 2009), available at http://www.latimes.com/news/local/la-me-california-budget20-2009feb20,0,2090428,full.story.

legislature could have fashioned a solution to prison healthcare that met federal requirements *without* spending billions of dollars on day spas for prison inmates. Yet because the state was locked into a consent decree from three years ago (when the budget crisis was not yet on the horizon), the legislature's ability to solve today's budget crisis was hamstrung to no small degree by the billions of dollars already committed by this and other consent decrees.

The democratic accountability of state and local government institutions is at even greater risk when legislative flexibility is impeded under injunctions or consent decrees of long duration:

> The upsurge in institutional reform litigation since *Brown v. Board of Education* ... has made the ability of a district court to modify a decree in response to changed circumstances all the more important. Because such decrees often remain in place for extended periods of time, the likelihood of significant changes occurring during the life of the decree is increased.

Rufo, 502 U.S. at 380 (citing *Brown*, 347 U.S. 483 (1954)).

The longer the contemplated duration of the injunction or consent decree, the more critical it becomes that district courts recognize that such injunctions and consent decrees must be limited in scope and flexibly administered. If they are not, they ultimately risk binding future elected officials to outdated agreements which are neither grounded in current circumstances nor connected to any ongoing

violation of federal law. Such an undermining of democratic accountability and subverting of the separation of powers has been rejected by this Court. *See, e.g., Frew*, 540 U.S. at 441 ("If not limited to reasonable and necessary implementations of federal law, remedies outlined in consent decrees involving state officeholders may improperly deprive future officials of their designative legislative and executive powers."); *Rufo*, 502 U.S. at 392 ("To refuse modification of a decree is to bind all future officers of the State, regardless of their view of the necessity of relief from one or more provisions of a decree that might not have been entered had the matter been litigated to its conclusion.")

A flexible approach to modification of injunctions and consent decrees is therefore necessary, both to ensure that previous legislatures have not improperly outsourced critical decision-making powers of state and local elected officials and, if they have, to return those decision-making powers to the legislative branch as soon as reasonably possible.

B. Fundamental and Sound Principles of Federalism Require That Injunctions and Consent Decrees Be Managed in Such a Way as to Avoid Subverting The Democratic and Legislative Processes.

While ALEC maintains that legislative flexibility is essential to proper democratic governance, ALEC also recognizes that this flexibility is sometimes necessarily constrained by the need for federal court intervention to remedy ongoing violations of federal law. However, anytime a federal

court does intervene – regardless of the justification – there is an unavoidable subversion of the democratic and legislative process. Recognizing this, the Court has established a "flexible standard" for modifying federal injunctions and consent decrees that impact state and local governments. *See Rufo*, 502 U.S. at 381 ("The experience of the District Courts of Appeals in implementing and modifying such decrees has demonstrated that a flexible approach is often essential to achieving the goals of reform litigation"); *Frew*, 540 U.S. at 441 (reiterating that a "'flexible standard' to the modification of consent decrees when a significant change in facts or law warrants their amendment") (citing *Rufo*, 502 U.S. at 393).

The flexible standard set forth in *Frew* shows the Court's respect for the sovereign powers of states and the limited nature of judicial equitable powers in utilizing injunctions and consent decrees to ensure compliance with federal law. The importance of placing reasonable limitations on the use of consent decrees cannot be overstated, as "such decrees 'reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions.'" *Rufo*, 502 U.S. at 381, (quoting *Heath v. De Courcy*, 888 F.2d 1105, 1109 (6th Cir. 1989)). It is therefore ALEC's belief that a "flexible standard" is the *only* principled way to balance the need for district courts to enforce federal law with the need to support the democratic accountability of state and local governments.

Moreover, this "flexible standard" has been aptly described as "consistent with one of the most basic principles of municipal law that holds that neither a government nor its officials may contract

away the power to govern."[6] As this Court once declared, "[a]ll agree that the legislature cannot bargain away the police power of a State." *Stone v. State of Mississippi*, 101 U.S. 814, 817 (1879). Similarly, "a departure from the constitutional plan cannot be ratified by the 'consent' of state officials." *New York v. United States*, 505 U.S. 144, 182 (1992). This Court, in *Frew*, "speaks to this reality by instructing judges and litigants that they are not to forget the values associated with local democracy and flexibility, nor the difficult reality or costs of social change. Judges walk a fine line when affirmatively dictating how government will deliver services."[7]

Finally, federal courts should be even more leery of substituting their policy judgment for lawmakers' judgment when the issue is hotly debated and subject to a wide likelihood of outcomes. In such contexts, there is a very real risk that politicians who are unable to obtain their favored policy outcome through the legislative process may instead seek to subvert the legislative process through consent decrees or injunctions.[8] *League of United Latin American Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 846 (5th Cir. 1993); *People Who Care v. Rockford Board of Educ. School Dist. No. 205*, 961 F.2d 1335, 1337 (7th Cir. 1992). Just such conduct occurred here. The former Governor of Arizona, along with

---

[6] Ross Sandler & David Schoenbrod, *The Supreme Court, Democracy and Institutional Reform Litigation*, 49 N.Y.L. Sch. L. Rev. 915, 923-924 (2005).

[7] Sandler & Schoenbrod, *supra*, at 929.

[8] This potential subversion of the legislative process is discussed in greater detail below (in Section II.B) with regards to the appropriations process.

various state education officials, have allowed the injunction and declaratory judgment to continue for reasons personal to their own political agendas and contrary to the collective will of the democratically-elected legislature. The continued support of the injunction by these government officials is indicative only of their unchanged individual policy preferences, and thus is no justification for the lower courts' decisions.

Federal courts should avoid taking sides in such policy debates, and should only assert their equitable power over state institutions where there is a continuing violation of federal law. *Evans*, 10 F.3d at 477-80; *Dowell*, 498 U.S. at 247.

C. The Ninth Circuit's Decision Ignores this Court's Long-Standing Precedent and Replaces it with a Standard That Flies in the Face of Democratic Accountability, Separation of Powers, and Principles of Federalism.

As the above discussion demonstrates, there are very real and very troubling risks associated with even the most necessary institutional reform litigation injunctions or consent decrees—and indeed it is these concerns that underlie the Court's "flexible standard" for granting relief under Federal Rule of Civil Procedure 60(b)(5). At the very least, district courts must recognize that an ongoing injunction exceeds "appropriate limits" when there is no continuing violation of federal law. *Evans*, 10 F.3d at 477-80; *Dowell*, 498 U.S. at 247. Here, the Ninth Circuit wrongly ignored this basic requirement – and indeed the entire "flexible standard" required under

this Court's precedent and applied by the Fourth, Sixth, Seventh and Eleventh Circuit Courts of Appeal[9] – and instead held that the injunction at issue here could only be modified upon a showing either "that the basic factual premises of the district court's central incremental funding determination had been swept away," or "some change in the legal landscape that makes the original ruling now improper."[10]

Such an interpretation treats the District Court's injunction and declaratory judgment as ends in themselves rather than as means of ensuring compliance with federal law, and is thus improper. Reversal of the ruling is necessary to vindicate this Court's "flexible standard" to modifying injunctions and consent decrees, and to revitalize important principles of democratic accountability, separation of powers, and federalism.

II. The Ninth Circuit Has Allowed the District Court to Co-opt the State Legislative Power of Appropriations in Order to Assert De Facto Control Over Arizona's Education System.

---

[9] *See Alexander v. Britt*, 89 F.3d 194, 199-200 (4th Cir. 1996); *Heath v. DeCourcy*, 888 F.2d 1105, 1110 (6th Cir. 1989); *In re Detroit Dealers Ass'n*, 84 F.3d 787, 790 (6th Cir. 1996); *Evans v. City of Chicago*, 10 F.3d 474, 477-479 (7th Cir. 1993); *O'Sullivan v. City of Chicago*, 396 F.3d 843, 862-865 (7th Cir. 2005); *Reynolds v. McInnes*, 338 F.3d 1221, 1226 (11th Cir. 2003); *Ensley Branch, NAACP v. Siebels*, 31 F.3d 1548, 1563-1566 (11th Cir. 2003).

[10] Pet. App. 63a.

Not only has the District Court here deprived the Arizona legislature of the flexibility needed to best educate both current and future ELL students, the Ninth Circuit has allowed the District Court to do so by improperly intruding on the domain of state legislative appropriations. This intrusion is improper on many levels, not the least of which is its disregard for the constitutional mandate that appropriations are properly a legislative function,[11] a principle that has been long recognized by both federal and state courts. *See, e.g., Bowsher v. Synar*, 478 U.S. 714, 763 (1986) ("appropriating funds is a peculiarly legislative function"); *Hunter v. State*, 177 Vt. 339, 346-349, 865 A.2d 381 (Vt. 2004) (and cases discussed therein); *State ex rel. Norfolk Beet-Sugar Co. v. Moore*, 50 Neb. 88, 96-102, 69 N.W. 373 (Neb. 1896).

Of course, ALEC recognizes that there is an unavoidable tension between legislative appropriations power and a district court's equitable authority to enforce federal law in the context of institutional reform litigation. It is inevitable that compliance with consent decrees and/or injunctions will require at least some (and often substantial) state expenditures. However, under the separation of powers doctrine, courts addressing institutional reform litigation should not ignore the importance of preserving legislative appropriations authority: "Financial constraints may not be used to justify the creation or perpetuation of constitutional violations,

---

[11] *See* U.S. Const. art I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time").

but they are a legitimate concern of government defendants in institutional reform litigation *and therefore are appropriately considered* in tailoring a consent decree modification." *Rufo*, 502 U.S. at 392-393 (emphasis added).

In order to balance the need to enforce federal law with the need to preserve legislative appropriations authority, ALEC believes that courts considering requests for modification of an injunction or consent decree should account for at least the following three related issues: (A) the complex and often contentious nature of the appropriations process; (B) the risk that institutional reform litigation can be used to circumvent the appropriations process; and (C) the inherent dangers in allowing earmark funding achieved through injunctions or consent decrees. As discussed below, failure to consider these key issues increases the likelihood that injunctions and consent decrees arising out of institutional reform litigation will far exceed their original purpose (i.e., addressing ongoing violations of federal law) and instead become mere political tools used to further particular political agendas.

A. Exercise of Appropriations Power Often Involves Complex, Contentious Trade-Offs that Belong Squarely in the Legislative Arena.

Appropriations decisions are often among the most contentious decisions made in state legislatures. Majority and minority political party caucuses in each chamber wrestle over spending priorities, competing interests are weighed, and compromises are reached through the political

process. State Senate and State House bodies duel with one another for weeks – or even months, as seen most recently in California – over spending items, sending budget proposals back and forth. In the final days of state legislative sessions, last-minute spending compromises often require painstaking negotiation.

It is not surprising that appropriations decisions necessarily include such difficulties, complexities, and trade-offs, particularly given that different and competing government agencies, public programs, and citizen constituencies vie for state funding from a limited (and too often dwindling) state treasury. "Public officials often operate within difficult fiscal constraints; every dollar spent for one purpose is a dollar that cannot be spent for something else." *Rufo*, 502 U.S. at 396 (O'Connor, J., concurring).

The weighing of different public policies and their related economic and social costs simply cannot be carried out according to bright-line formulas. To the contrary, consideration of innumerable variables is called for in reaching political compromises. It goes without saying that such a political process, characterized as it is by contentious debate and political compromise – is also a process ripe for abuse. It is thus vital that the appropriations process remain centered within the legislature, which, while not immune to abuse, is safeguarded by built-in democratic accountability. When appropriations are removed or distanced from the legislative process, the potential for abuse too often becomes reality.

B. Frustrated Political Factions Can Improperly Use Institutional Reform Litigation to Circumvent the Legislative Appropriations Process.

The purpose of injunctions or consent decrees in institutional reform cases is to address current and ongoing violations of federal law, and as such should ideally remain separated from the political dimensions attendant to appropriation matters. *Missouri v. Jenkins*, 515 U.S. 70, 130-33 (1995) (Thomas, J., *concurring*). Unfortunately, institutional reform litigation is often seen by rival political factions as merely another battlefield for their political disputes.[12]

For example, defendant state and local officials can enter into a consent decree (or choose not to contest an injunction) in hopes of obtaining benefits (e.g., funding) for an institution or program that they have failed to obtain through the legislative appropriations process. In other words, institutional reform litigation in such cases is used to transfer the debate over appropriations out of the legislature and into the federal courts.

---

[12] *See* Jeremy A. Rabkin & Neal E. Devins, *Averting Government by Consent Decree: Constitutional Limitations on Settlements with the Federal Government*, 40 Stan. L. Rev. 203, 271 (1987):

> [O]fficials in different agencies at different levels of authority are engaged in continuous pulling and hauling over resources, priorities, and subtle gradations of policy. A consent decree can be an all too ready handle for officials at one level to manipulate their superiors or rivals.

Other government officials may enter into consent decrees in order to dodge negative publicity by abdicating responsibility to the federal courts for unpopular initiatives and/or funding decisions.[13] In this sense, many institutional reform litigation cases – including this case – are used by vying political factions to shift the venue of ongoing public policy disputes from the court of public opinion to a court of law.

Regardless of the motivation for entering into a consent decree, or for choosing not to fight an injunction, the mere fact that a particular appropriations issue is taken over by the federal courts has both short-term and long-term implications on the appropriations process generally.

In the short term, it must be recognized (as it surely is by the government officials involved), that the particular issue addressed through the consent decree or injunction is effectively taken off the appropriations bargaining table. As discussed above, appropriations decisions are often reached as a result of negotiation, bartering, and compromise. By obtaining one of their appropriations goals outside of the legislative process, the political faction

---

[13] Sandler & Schoenbrod, *supra*, at 927:

> Governors and mayors generally share the goals of the litigation; they desire to avoid being labeled as lawbreakers and to be seen instead as problem solvers. They cannot reliably be depended upon to withhold consent from decrees that set out obligations in excess of, or different from, the federal statute, or which imposes details of compliance and milestones that would under other circumstances be left to the managers of the program.

supporting the consent decree will have preserved political capital and negotiating leverage. In turn, they can utilize this leverage to gain additional appropriations concessions that they never would have obtained otherwise. Thus, even where a district court asserts allegedly "narrow" control over a particular issue (here, ELL funding), such control in reality has a broad and profound effect on the overall appropriations process.

The long term impact of injunctions or consent decrees that invade the appropriations process is equally profound, and perhaps even more troubling. First, the short term negotiation/leverage issue discussed above does not dissipate with time. To the contrary, each year the political faction having obtained the injunction or consent decree will approach the appropriations bargaining table with an ace up their sleeve. Second, where the injunction or consent decree dictates long-term spending on a particular issue (as is the case here), there is a very real possibility that a type of "funding inertia" will develop, such that the state may be unable to decrease the funding level even *after* the consent decree or injunction is ultimately modified or rescinded.[14] Thus, what should properly be a

---

[14] This concern is not merely theoretical. Some state governors are considering rejecting funds being provided to states through the recent stimulus legislation for similar reasons. They fear that, while the stimulus funding is temporary, the increased spending will become a habit their states cannot break. *See, e.g.*, Brad Haynes, "Tennessee's Democratic Governor Weighs Rejecting Stimulus Funds," The Wall Street Journal (Feb. 24, 2009) (reporting that Tennessee's Governor Phil Bredesen "is concerned that accepting $141 million for Tennessee's unemployment insurance would force the state to expand the program and leave state taxpayers with the bill in two years'

temporary and focused solution to particular violations of federal law can, when used instead as a means to circumvent the appropriations process, evolve into permanent earmark funding.

C. The Ninth Circuit's Decision Risks Subjecting State Legislatures to an Increasing Number of District Court Injunctions Requiring Earmarks.

By giving federal district courts broad latitude to impose particular mechanisms for appropriations based on novel federal legal requirements, the Ninth Circuit has empowered district courts to enter ongoing public policy battles by controlling funding of state and local institutions and programs. As a result, state and local governments now face greater likelihood that institutional reform plaintiffs (and often the government defendants themselves) will seek earmark appropriations by judicial order.

This specter of earmark appropriations through federal district court consent decrees and injunctions threatens states in a multitude of areas. For example, in the health care arena, states are increasingly taking on greater obligations to their citizens through Medicaid programs,[15] and are

---

time") available at http://blogs.wsj.com/washwire/2009/02/24/tennessees-democratic-governor-weighs-rejecting-stimulus-funds/.

[15] National Governors Association and National Association of State Budget Officers, *The Fiscal Survey of States* 8 (Dec. 2008) ("Medicaid accounted for 20.7 percent of total state spending in fiscal 2008.... Since Medicaid spending makes up such a large portion of state budgets, the growth rates relative to overall budget increases have a significant impact the allocation of

projected to face serious long-term budgetary difficulties in meeting these obligations.[16] Medicaid comes with significant federal requirements that states must meet to obtain matching federal grants, and state compliance with these federal requirements has already been the subject of institutional reform litigation. *See, e.g, Frew*, 540

---

state spending") available at http://www.nasbo.org/Publications/PDFs/Fall2008FiscalSurvey.pdf.

[16] Government Accountability Office, *State and Local Governments: Growing Fiscal Challenges Will Emerge during the Next 10 Years* 1 (Washington, DC: GAO, January, 2008) ("in the absence of policy changes, large and recurring fiscal challenges for the states and local sector will begin to emerge within a decade" and observing that "the growth in the health-related costs serves as the primary driver of the fiscal challenges facing the state and local government sector") available at www.gao.gov/new.items/d08317.pdf. *See also* Stanley J. Czerwinski, Government Accountability Office, *State and Local Fiscal Challenges: Rising Health Care Costs Drive Long-term and Immediate Pressures*, 1 (Washington, DC: GAO, January, 2008):

> Growth in health-related spending [] drives the long-term fiscal challenges facing state and local governments. The magnitude of these pressures presents vexing long-term sustainability challenges for all levels of government. The current turmoil in the financial sector adds to the immediate fiscal and budgetary challenges for these governments as they attempt to remain in balance in a rapidly changing and uncertain budget environment. States and localities are facing increased demand for services during a period of declining revenues and reduced access to capital.

U.S. at 433 ("State participation [in Medicaid] is voluntary; but once a State elects to join the program, it must administer a state plan that meets federal requirements"). In light of these long-term difficulties, ALEC has expressed misgivings with a district court's oversight of Tennessee's Medicaid program. Reforms approved in 2004 by Tennessee's governor and the state legislature were blocked because of consent decrees dating to 1979. *See Grier v. Goetz*, 402 F.Sup.2d 871 (M.D. Tenn. 2005), amended by, motion denied by *Grier v. Goetz*, 2006 U.S. Dist. LEXIS 11211 (M.D. Tenn., Mar. 15, 2006). The result from these cases, at least initially, was that only some of the legislatively-approved reforms were allowed to go forward.[17] In turn, taxpayers were saddled with increased costs and many Medicaid enrollees lost their coverage..

ALEC has also expressed concerns with a number of other institutional reform litigation consent decrees. For example, *Jose P. v. Ambach* was a class action brought under the Individuals with Disabilities Education Act (IDEA). *Jose P. v. Ambach*, No. 9 Civ. 270 (E.D.N.Y. Feb. 1979); 20 U.S.C. §§ 1400 et seq. As a consequence of this litigation, special education in New York City has been subject to a consent decree since 1979, thwarting efforts by successive mayors and school officials to make reforms and update policies for implementing IDEA. Due to budget constraints, the decree has reduced money available for students in non-special education courses, as plaintiffs' attorneys

---

[17] The Sixth Circuit did eventually reverse two of the district court's orders. *See Rosen v. Goetz*, 410 F.3d 919 (6th Cir. 2005); *Rosen v. Goetz*, 129 Fed. Appx. 167 (April, 12, 2005).

have retained control over significant portions of the city's budget. Thus, under the decree, the City Council has been shut out of important policy-making decisions, and outdated policies have been locked into place without any meaningful review of their effectiveness or continuing appropriateness.

ALEC has likewise voiced concern with the decree controlling the Los Angeles County Metropolitan Transit Authority. *Labor/Community Strategy Ctr. v. L.A. County Metro. Transp. Auth.*, 263 F.3d 1041 (9th Cir. 2001), cert. denied, 535 U.S. 951 (2002). By decree, the Transit Authority has been required to give busing 47 percent of its budget resources, with all remaining transportation necessities receiving a little over half of the budget. *Labor/Community Strategy Ctr. v. L.A. County Metro. Transp. Auth.*, No. CV 94-5936 (C.D. Cal. Oct 31, 1996). This inflexible budget mandate has severely hampered the Transit Authority's ability to address the evolving transportation needs of Los Angeles and its surrounding counties (e.g., by developing more extensive mass transit).

The above cases are only a few of the numerous examples of the inherent dangers when the judiciary co-opts the legislature's appropriations role. The Ninth Circuit's inflexible approach to the modification of district court injunctions and consent decrees could dramatically increase institutional reform litigation seeking similar earmarked spending. By creating nearly impossible hurdles for modifying existing injunctions and consent decrees, the Ninth Circuit has created a perverse incentive for some politicians and government officials to manipulate institutional reform litigation (regardless of the actual merits of the litigation) in order to

obtain benefits for institutions or programs that otherwise could not be achieved through the legislative process. Once earmarked funding has been obtained through a consent decree or injunction, the Ninth Circuit's new inflexible standard insulates these earmarks from future shifts in political power.

Such use of institutional reform litigation necessarily undermines the separation of powers, allowing district courts to elevate discretionary policy choices involving legislative appropriations into specific federal requirements—and doing so here while holding the Arizona legislature hostage with threats of multi-million dollar daily fines. This Court's vindication of the flexible standard for administering injunctions and consent decrees is crucial to correcting the Ninth Circuit's troubling backslide.

III. Public Education Is Properly the Domain of State Policymakers—Not Federal Courts.

The policy considerations and legal implications discussed above are nowhere more important than in the context of public education and ELL services. As this Court has repeatedly recognized, public education is a primary responsibility of states. *See, e.g., Brown v. Board of Education*, 347 U.S. 483, 493 (1954). Even when addressing highly-charged constitutional issues, such as school desegregation, the maintenance of public education should ultimately rest in the hands of state and local officials: "federal judicial supervision of local school systems was intended as a temporary measure," with the ultimate objective being "to return school

districts to the control of local authorities." *Freeman v. Pitts*, 503 U.S. 467, 489-90 (1992).

Furthermore, it is not only the setting of curriculums or the training and overseeing of teachers that ultimately belongs under local control. The Court has also recognized that financing of public education is itself a significant function of state and local governments. *See, e.g., San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 58 (1973) ("The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States.").

Maximizing local control of public education is sound policy. ALEC believes that public education and finance decisions are necessarily local and intimate in nature, and recognizes an interconnectedness between parents, taxpayers, and government officials that forms the crux of public education administration. Indeed, "local autonomy of school districts is a vital national tradition, and... a district court must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution." *Missouri v. Jenkins*, 515 U.S. at 99; *Dowell*, 498 U.S. at 248 ("Local control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit that needs.").

Here, the Ninth Circuit has disregarded this fundamental recognition of the importance of local, democratically-informed control and funding of education, and instead has allowed the District Court to seize control of Arizona's statewide ELL services.

Make no mistake about it: the Ninth Circuit's opinion, if upheld, will impact every aspect of Arizona's ELL services at some level—from financing, to curriculum, to training and staffing. By impeding the Arizona Legislature's ability to work with local school districts to pursue innovative ELL solutions – solutions that include good incentives, standards, and accountability – the Ninth Circuit and the District Court have wrestled control of Arizona's ELL services away from those best suited to educate Arizona's youth.

In short, the Ninth Circuit has allowed the District Court to further its own educational agenda by inserting itself into an education policy dispute between the political branches of Arizona. This Court's long-standing precedent simply does not allow the federal courts to override state and local control of education absent a current and ongoing violation of federal law. *Rufo*, 502 U.S. at 389. As discussed below, it is ALEC's firm belief that to allow otherwise is both improper and inefficient, and ultimately will severely undercut the ability of Arizona's schools to best educate their ELL students.

A. States Must Balance Competing Interests While Managing Interconnected and Ever-evolving Educational Challenges.

Today's educational landscape is more complex and demanding than ever before. Managing the interconnected relationship of education constituencies involves myriad complexities, competing policy choices, and trade-offs. It is local authorities who are on the front lines of addressing these competing interests, and local authorities who

have the ultimate mandate to manage their districts properly. Thus, local institutions must be allowed to utilize a variety of policy approaches to ensure proper accountability, standards, and funding for their educational programs. Simultaneously, states must ensure that the interests of local control are balanced by performance-driven accountability standards. Particularly in light of the current economic uncertainty, it is vital that states retain flexibility to make appropriations decisions that allow them to manage these competing interests, meet increasing federal mandates, and avoid disastrous budget shortfalls.

1. Without Proper Accountability, More Money Does Not Result in Improved ELL Services.

Complicating these issues further, and thus buttressing the importance of a system centered on local control, is the fact that the most effective methods for achieving improved educational performance is a matter of ongoing debate.

Early advocates for education reform (in the 1970s and 1980s) pushed for increases in absolute funding as the primary means by which reform should be obtained. However, as ALEC's studies of educational spending have demonstrated, rigorous performance standards and financial accountability mechanisms are crucial to improving public education, and increases in educational spending without standards and accountability will most likely be ineffective. This is not news to this Court. Indeed, the Court has recognized that "one of the major sources of controversy concerns the extent to

which there is a demonstrable correlation between educational expenditures and the quality of education." *Rodriguez*, 411 U.S. at 42-43.

The policy debate regarding the effectiveness of increased spending as the primary approach to improving overall educational performance continues today. For instance, ALEC's recent study of educational spending increases and student achievement test results raised questions as to the effectiveness of spending increases alone in improving performance.[18] This study established that factors such as per pupil expenditures, teacher salaries, and funds received from the federal government do not – either taken together or alone – explain differences in school achievement. *Id.* By negative inference, then, there must be factors other than funding that do explain these achievement differences.

Another study suggests that factors such as financial accountability and academic standards – as opposed to merely increasing absolute spending – have profound effects on educational performance. [19]

---

[18] Andrew T. LeFevre, *Report Card on American Education: A State-by-State Analysis* (15t ed.) 132-133, American Legislative Exchange Council (Feb. 2009) available at: http://www.alec.org/am/pdf/ReportCard08.pdf.

[19] U.S. Chamber of Commerce, *Leaders and Laggards: A State-by-State Report Card on Educational Effectiveness* 7 (Feb. 2007) available at http://www.uschamber.com/NR/rdonlyres/e6vj565iidmycznvk4ikm3mryxo5nslm7iq2uyrta5vrqdxsagjvkxafz6r3buzaopo4uxv4o4ep4nvhmc3ppc7drjd/USChamberLeadersandLaggards.pdf.

See also Dan Lips, Shanea J. Watkins, and John Fleming, *Does Spending More on Education Improve Academic Achievement?* 6, The Heritage Foundation (Sept. 8, 2008)

Additionally, scholarly debate exists over whether it is effective to mandate educational spending increases through litigation in the first instance.[20] Recent scholarship suggests that while court mandates for education spending may have some short-term results, the long-term impact has not been particularly positive.[21]

Finally, it is not only scholars and advocacy groups that have recognized the inadequacy of relying solely on increased spending to increase ELL effectiveness. There was a bipartisan recognition of the need for stricter accountability and standards that led to Congress enacting NCLB in 2002. Title III of NCLB specifically addresses the issues of ELL. Moving beyond the "appropriate action" required under the EEOA, Congress required states and

---

available at http://www.heritage.org/Research/Education/bg21789.cfm ("Long-term measures of American students' academic achievement ... show that the performance of American students has not improved dramatically in recent decades, despite substantial spending increases").

[20] *See, e.g.*, Matthew G. Springer and James W. Guthrie, "Adequacy's Politicization of the School Finance Legal Process," *in* School Money Trials 121 (Martin West, ed., Brookings Institution Press) (2007) ("Legislative and executive branch deliberations are better adapted to accommodating uncertainty, deconstructing complexity and considering trade-offs since their operational arrangements permit a far wider opportunity for constructive criticism and successive approximation to take place").

[21] *See* Frederick Hess, "Adequacy Judgments and School Reform," *in* School Money Trials 185 (Martin West, ed., Brookings Institution Press) (2007) ("successful adequacy efforts modestly boosted total spending but had no discernable effect on teacher pay or class size").

school districts to implement new programs, develop quantifiable performance benchmarks, and annually report progress. *See* 20 U.S.C. §§ 6301, *et seq.* *See also Claremont Sch. Dist. v. Governor*, 147 N.H. 499, 508-509 (N.H. 2002) (concluding that accountability standards are an essential component of the State's constitutional duty to provide adequate education).

2. The Ninth Circuit's Decision Disregards the Congressional Mandate for Accountability and Standards, Insisting Instead that Earmarked Spending Is the Only "Appropriate Action."

If nothing else, the above discussion demonstrates that there are no bright-line solutions to the challenges facing schools endeavoring to improve educational performance. For this reason, ALEC believes it is vital that state and local governments fulfill their responsibilities within the context of democratic accountability and separation of powers. Thus, while it is undisputed that federal district courts may ensure that public education meets the requirements of federal law, it is state and local governments that are best equipped to determine the means by which that end is met. *See Freeman*, 503 U.S. at 489 ("the court's end purpose must be to remedy the violation and, *in addition*, to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution) (emphasis added). Put another way, district courts must remain focused on whether public education is in compliance with the standards of federal law, not take sides in contested educational

policy debates over the most effective methods for obtaining such compliance. Under the Ninth Circuit's decision, district courts can usurp the role of state and local governments in order to promote disputed policy viewpoints under the guise of enforcing federal law. This approach undermines (indeed nearly obliterates) democratic accountability and separation of powers.

The negative impact of such a role-reversal is highlighted by the Ninth Circuit's decision here. The District Court posited that increased educational spending correlates with ELL educational success—supposedly fulfilling the requirements of EEOA § 1703(f). By implication, more balanced policy approaches – such as those that include performance standards and financial accountability – are unsatisfactory. But, as discussed above, throw-more-money-at-the-problem approach ignores the fact that the correlation between increased spending and improved performance is questionable at best. Thus, while the original finding of a violation of the EEOA and subsequent injunction and consent decree purported to ensure that Arizona schools meet federal requirements for ELL, in reality it has likely had the opposite effect. The goal of achieving equal access to educational opportunities for ELL students has been replaced by a policy decision that specific earmark funding for ELL programs is the only way to comply with the EEOA—notwithstanding that the requirements imposed by the District Court clearly exceed the terms of the EEOA and NCLB.

Remarkably, this policy decision has been endorsed by both the Ninth Circuit and the District Court despite their recognition that Arizona has "substantially complied" with the purpose of the

original injunction. In other words, the Ninth Circuit and District Court have unnecessarily placed means above ends in purporting to ensure compliance with federal law.

B. Reversal Is Necessary to Restore Control Over the Education of Arizona's Youth to Arizona's Democratically Elected Leaders.

The encroachment on the Arizona legislature's responsibilities and powers has only been exacerbated by the Ninth Circuit's inflexible approach to the modification of the injunction. The Ninth Circuit failed to consider whether an injunction could even be obtained under current factual circumstances or under current law. Pet. App. 63a. In particular, it refused to consider changed factual circumstances owing to the Arizona Legislature's newly-adopted accountability standards and increased spending for education under HB 2064, and similarly refused to consider changed federal legal requirements under NCLB. *Id.* In so doing, the Ninth Circuit disregarded this Court's guidance with regards to employing a "flexible standard" for the modification of injunctions and consent decrees, and instead improperly allowed the District Court to choose a particular public policy for addressing a core state function.

Reversal of the lower courts' rulings by this Court is necessary to reassert the inherent limits of federal district courts' equitable powers. In *Rufo*, this Court observed that "the public interest and '[c]onsiderations based on the allocation of powers within our federal system,' ...require that the district court defer to local government administrators, who

have the 'primary responsibility for elucidating, assessing, and solving' the problems of institutional reform, to resolve the intricacies of implementing a decree modification." *Rufo*, 502 U.S. at 392 (quoting *Dowell*, 498 U.S. at 248 and *Brown*, 349 U.S. at 299). The Ninth Circuit's inflexible approach enables district courts to disregard principles of federalism by failing to defer to states' discretionary authority in providing public education. As a result, the Arizona legislature has been deprived of the most effective methods of satisfying federal requirements—namely through implementing policies emphasizing performance standards and financial accountability.

This Court must once again recognize that the federal judiciary cannot go it alone in formulating a one-size-fits-all regime whereby more spending, coupled with little else by way of accountability and performance-based standards, is the law of the land. Instead, the Court should return the authority to make local public education decisions to its rightful owners—those legislators and local officials who are entrusted by parents and taxpayers to make such decisions. The Arizona legislature has held fast to its understanding that it takes more than simply money to accomplish the multifaceted goals of a successful ELL system. The legislature has refused to cave to the enticing allure of simply "throwing money" at the problem. Instead, the legislature has carefully examined other approaches, in addition to absolute spending, that the state may adopt to best meet the federal compliance mandates while reaching its own educational goals. The Court should reward these efforts; not discourage them.

IV. Petitioners Have Standing to Appeal the Rulings of the Lower Courts in this Matter.

Finally, ALEC is compelled to briefly address the Ninth Circuit's questions regarding the Arizona legislature's standing in this matter. The Ninth Circuit noted that plaintiffs had challenged "the standing of the two Legislative Intervenors, as they speak only for themselves and do not represent the legislature as a whole, have no judgment against them, and no apparent direct interest in the judgment outside of an abstract policy interest." *Flores v. Arizona*, 516 F.3d 1140, 1165 (9th Cir. 2008). While the Ninth Circuit went on to dismiss the issue of standing ("[p]arties need not have standing to intervene in our circuit"), it did so only after claiming that "the extent and degree of the standing of individual legislatures under these circumstances is in very serious question." *Id.*

This statement is perplexing. There is no question that the Speaker of the Arizona House of Representatives and the President of the Arizona Senate intervened here not as "individual legislators," but rather as the duly-appointed leaders of their respective legislative bodies. *See* JA 80-85. Thus, *Raines v. Byrd*, 521 U.S. 811, the case relied on by the Ninth Circuit as raising this "serious question" of standing, is inapplicable on these facts. In *Raines*, the appellees were six individual members of Congress, and they brought their action unquestionably as individual members. *Id.* at 821. In holding that the individual members lacked standing, the Court explicitly emphasized "the fact that appellees have not been authorized to represent

their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit." *Id.* at 829.

The opposite is the case here. Both the Speaker of the Arizona House of Representatives and the President of the Arizona Senate have been authorized to represent their respective legislative bodies, and the legislature supports their actions in appealing the lower courts' rulings. *See* JA 80-85.

The only question, then, is whether Arizona's legislative bodies have standing. Of this there can be no doubt. *See Warth v. Seldin*, 422 U.S. 490, 498, (the question of standing concerns whether the litigant has a stake in the outcome and whether the litigant "is entitled to have the court decide the merits of the dispute or of particular issues"). There is no question that the Arizona legislature has a stake in the outcome of this matter. Under the District Court's December 16, 2005 order, the legislature was given a series of deadlines by which to comply with the District Court's ELL funding mandates. Failure to meet these deadlines resulted in escalating fines levied directly against the Arizona legislature, culminating with fines of up to $2 million per day if the legislature was not in compliance after the close of the 2006 legislative session. Faced with these escalating fines – relating to an injunction from a case to which the legislature was not even a party – the Arizona legislature intervened on March 8 2006.

In short, the legislature is precisely the party to respond to the direct threat of millions of dollars in daily fines, as well as to the indirect attacks on its legislative efforts and authority. This is why the legislature properly intervened in the first place, and

why the legislature, through its duly-appointed leaders, has standing to appeal the lower courts' decisions. This matter has therefore properly been brought before the Court by petitioners.

CONCLUSION

This case has nationwide ramifications for federalism and separation of powers. The Ninth Circuit has departed from this Court's "flexible standard" to modifying injunctions and consent decrees, and is refusing to accord state elected officials deference in making complex public policy choices. Such a ruling paves the way for increasingly rigid injunctions and consent decrees, issued against state and local government institutions, based upon novel readings of federal law that are grounded more in district court policy preference than straightforward readings of federal statutes.

Further, such an exercise of judicial power will increase the temptation by political factions to seek relief from the courts that they were unable to obtain in the political process. The consequences of such moves are, of course, manifest and negative for the courts and the political system.

Reversal of the Ninth Circuit's ruling is especially important given its impact in the realm of public education. ALEC firmly believes that standards and accountability are crucial to public educational success. The ability of legislators to take state and local dynamics into account while setting educational policy is undermined by inflexible district court decrees and injunctions unreflective of changes in factual circumstances or law. The ability of states to adopt innovative new approaches to providing education is diminished when district

courts micro-manage educational policy, especially if spurred on by one political faction or another. As such, ALEC respectfully requests that the Court grant the relief requested by petitioners.

Respectfully submitted,

ROBERT O'BRIEN
Counsel of Record
JONATHAN E. PHILLIPS
ARENT FOX
555 West Fifth St., Fl. 48
Los Angeles, CA 90013-1065
(213) 443-7512

SETH L. COOPER
AMERICAN LEGISLATIVE
EXCHANGE COUNCIL
1101 Vermont Ave, NW, Fl.11
Washington, DC 20005
(202) 742-8524

Counsel for Amicus Curiae

APPENDIX

APPENDIX

ALEC's Resolution on the Federal Consent Decree Fairness Act

PURPOSE: Urging Congress to enact the Federal Consent Decree Fairness Act to ensure that federal consent decrees are narrowly drafted, limited in duration, and respectful of state and local interests and policy judgments.

WHEREAS, in a growing number of cases involving state and local governments across the nation, consent decrees have become a means by which federal judges make policy decisions that are best left in the hands of state and local officials; and

WHEREAS, consent decrees can remain in place for decades and lock-in policies that were agreed to by state and local officials who are no longer in office; and

WHEREAS, newly-elected state and local officials often inherit overbroad or outdated consent decrees that limit their ability govern and respond to the priorities and concerns of their constituents; and

WHEREAS, existing procedures discourage current state and local officials from trying to modify or terminate a consent decree, even where such a decree no longer represents the best approach for local communities; and

WHEREAS, in one recent example, reforms to Tennessee's Medicaid program – proposed by the

governor and approved by the state legislature in 2004 – were blocked in federal court because they ran afoul of consent decrees dating back to 1979, and only some of the reforms were permitted to go forward, resulting in increased costs for taxpayers and the loss of coverage for many Medicaid enrollees; and

WHEREAS, in another example, consent decrees have forced the Los Angeles County Metropolitan Transit Authority to spend 47 percent of its budget on buses, leaving just over half the budget to pay for the county's remaining transportation needs; and

WHEREAS, in a further example, special education in New York City has been governed by a consent decree since 1979, thwarting efforts by successive mayors and schools chancellors to implement new reforms and updated policies for implementation of the Individuals with Disabilities Education Act (IDEA); and

WHEREAS, in Frew v. Hawkins, 540 U.S. 431 (2004), the U.S. Supreme Court – while upholding the consent decree in question – expressed its concern that consent decrees may "improperly deprive future officials of their designated legislative and executive powers," which may lead to "federal court oversight of state programs for long periods of time even absent an ongoing violation of federal law."; and

WHEREAS, the Federal Consent Decree Fairness Act, now pending in Congress, is bipartisan legislation that addresses weaknesses in the current

system while preserving consent decrees as a mechanism for settling legal disputes; and

WHEREAS, the Federal Consent Decree Fairness Act provides a three-pronged approach to address these weaknesses by: (1) allowing a state or local government to file a motion in federal court to modify or vacate a consent decree after four years or after the state or local official who provided consent leaves office, whichever comes sooner; and (2) after a motion to modify or vacate a consent decree has been filed, shifting the burden of proof to the plaintiffs to demonstrate why management of a program should continue to rest with the court rather than be returned to hands of elected officials; and (3) setting out a series of findings, based on the U.S. Supreme Court's decision in Frew, to provide guidance to federal courts to ensure that for future consent decrees are narrowly drafted, limited in duration, and respectful of state and local interests and policy judgments; and

WHEREAS, this legislation goes to the very heart of democracy, in that citizens are entitled to elect state legislators and other leaders to make policy decisions and do the business of governing, and federal judges are neither public policy experts nor accountable to the electorate for the choices they make.

THEREFORE, BE IT RESOLVED, that the American Legislative Exchange Council supports the principle that federal consent decrees should be narrowly drafted, limited in duration, and respectful of state and local interests and policy judgements; and

BE IT FURTHER RESOLVED, that Congress should enact the Federal Consent Decree Fairness Act.

Adopted by ALEC's Civil Justice Task Force at the Annual Meeting July 20, 2006. Approved by the ALEC Board of Directors August, 2006.

AMICUS CURIAE BRIEF

121

Supreme Court, U.S.
FILED
FEB 25 2009
OFFICE OF THE CLERK

(8) (11)

Nos. 08-289, 08-294

In the
Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT, ARIZONA PUBLIC INSTRUCTION
Petitioners

v.

MIRIAM FLORES, *ET AL.*,
Respondents

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES, *ET AL.*,
Petitioners

v.

MIRIAM FLORES, *ET AL.*,
Respondents

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Brief of the American Unity Legal Defense Fund, English Language Political Action Committee, ProEnglish and the Center for Equal Opportunity, As *Amici Curiae* Supporting Petitioners

BARNABY W. ZALL
Counsel of Record for Amici Curiae
Weinberg & Jacobs, LLP
11300 Rockville Pike, #1200
Rockville, MD 20852
(301) 231-6943

BOTH 4CN43V

Questions Presented

1. Whether a federal-court injunction seeking to compel institutional reform should be modified in the public interest when the original judgment could not have been issued on the state of facts and law that now exist, even if the named defendants support the injunction.

2. Whether compliance with the No Child Left Behind Act's extensive requirements for English-language instruction is sufficient to satisfy the Equal Educational Opportunities Act's mandate that States take "appropriate action" to overcome language barriers impeding students' access to equal educational opportunities.

Table of Contents

Table of Authorities iii

Interest of *Amici Curiae* 1

Preliminary Statement 2

A. "Bilingual Education:" Teaching English Language Learners in Their Native Languages... 3

B. Bilingual Education Was Preferred by Federal Policies, But Proved Largely Ineffective 4

C. Some Schools Introduced New "English Immersion" Teaching Methods..... 7

D. Structured English Immersion Proved More Successful Than Bilingual Education..... 10

E. Parents and Educators Began Rejecting Bilingual Education Programs and Advocating for English Immersion Programs..... 12

F. Federal Policy Preferences Changed to Favor English Language Acquisition 15

Summary of Argument 17

Argument 19

I. The Decision Below Distorts And Misapplies The *Castaneda* Test 19

A. The Equal Educational Opportunities Act 19

B. The Fifth Circuit Crafted a Three-Part *Castaneda* Test to Evaluate EEOA Claims 22

C. The Decision Below Distorts and Misapplies the *Castaneda* Test 26

II. The Decision Below Distorts And Misapplies The Relationship Between The EEOA And The NCLB 35

A. The Goals of the EEOA and Title III of the NCLB Are The Same 35

B. Title III Is An Individually-Focused Civil Rights Law 36

C. The Ninth Circuit's Approach Could Harm, Not Help, Children 38

Conclusion 39

Table of Authorities

Cases:

Calif. Teachers Ass'n v. State Bd. Of Ed., 271 F.3d 1141 (9th Cir. 2001) 13, 29

Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981) ..... *passim*

Castaneda by Castaneda v. Pickard, 680 F.2d 456 (5th Cir. 1986) 30

Flores v. Arizona, 516 F.3d 1140 (9th Cir. 2008) ..... *passim*

Gomez v. Illinois State Bd. Of Education, 811 F.2d 1030 (7th Cir. 1987) 26, 30

Guadalupe Organization, Inc. v. Tempe Elementary School Dist. No. 3, 587 F.2d 1022 (9th Cir 1978) 21, 22

Idaho Migrant Council v. Bd. Of Educ., 647 F.2d 69 (9th Circ. 1981) 37

Keyes v. School District No. 1, 521 F.2d 465 (10th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976) 20

Lau v. Nichols, 414 U.S. 563 (1974) 3, 4, 5

Serna v. Portales Municipal Schools, 351 F.Supp. 1279 (D.N.M.1972) 20

Serna v. Portales Municipal Schools, 499 F.2d 1147 (10th Cir. 1974) 20

Sorenson v. Secretary of Treasury of U.S., 475 U.S. 851 (1986) 30

United States v. Texas, 342 F.Supp. 24 (E.D.Tex. 1971), *aff'd*, 466 F.2d 518 (5th Cir. 1972) 21

United States v. Texas, 680 F.2d 356 (5th Cir. 1982) 26

United States v. Texas Education Agency, 532 F.2d 380 (5th Cir.), *vacated sub nom. Austin Independent School District v. United States*, 429 U.S. 990 (1976) 21

Valeria v. Davis, 307 F.3d 1036 (9th Cir. 2002) 2, 13

Valeria G. v. Wilson, 12 F.Supp.2d 1007 (N.D. Cal. 1998) 2

Statutes:

Bilingual Education Act of 1974, 20 U.S.C. § 880b *et seq.* (1976) 4

Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1703(f) ..... *passim*

Title III of the No Child Left Behind Act, 20 U.S.C. § 6812, *et seq.* ..... *passim*

20 U.S.C. § 3401 *et seq* 15

20 U.S.C. § 6812(1) 16, 31

A.P.S. § 15-751.1 4

A.R.S. § 15-751.5 10

A.R.S. § 15-752 9

A.R.S. § 15-753 9

147 Cong. Rec. S13328 (Dec. 17, 2001) 15, 38

Miscellaneous:

Accountability Division, Research and Evaluation Section, Arizona Dept. of Education, "State Report Cards," Dec. 29, 2008, available at: www.ade.az.gov/srcs/statereportcards 31, 32

Arizona Dept. of Education, *The Effects of Bilingual Education Programs and Structured English Immersion Programs on Student Achievement: a Large-Scale Comparison*, July 2004, available at: http://epsl.asu.edu/epru/articles/EPRU-0408-66-OWI.pdf 4, 9, 10

Keith Baker, *et al.*, *Effectiveness of Bilingual Education: A Review of the Literature*, U.S. Dept. of Education, 1981, available at: http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/32/b7/39.pdf 6, 8

Paul Berman, *et al.*, *Meeting the Challenge of Language Diversity: An Evaluation of Programs for Pupils of Limited Proficiency in English*, BW Associates, Berkeley, California, 1992 6

Commission on Behavioral and Social Sciences and Education, National Research Council, Institutes of Medicine *Educating Language Minority Children*, National Academy Press, Washington, D.C., 1998, available at http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/15/93/9d.pdf 7

Comm. On Ed. & the Work Force, "No Child Left Behind Act of 2001," H.R. Rep. 107-63, Pt. 1 ..... 12, 38

Commonwealth of Massachusetts Board of Education, *Report No. 5 to the United States District Court, District of Massachusetts on Boston School Desegregation*, Vol. 2, July 15, 1985 6

Conf.Rep. No. 93-1026, 93d Cong., 2nd Sess. (1974), *reprinted* in (1974) U.S.Code Cong. & Ad.News 4093 5

Elections Division, State of Massachusetts, "Massachusetts 2002 Election Ballot Question Results," available at: www.sec.state.ma.us/ele/eleres/questions.htm 14

English for the Children of Massachusetts, *Ballot Initiative Campaign Launched to Dismantle Bilingual Education in Massachusetts*, July 31, 2001, available at: www.onenation.org/0107/pr073101.htm 14

Russell Gersten, *et al.*, *Bilingual Immersion: A Longitudinal Study*, READ Institute, Washington, D.C. 1992, available at: http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/29/b2/e6.pdf 10

Daniel Gonzalez, "Arizona Win Encourages Bilingual Ed Opponents," *Arizona Republic*, Nov. 20, 2000, A-1, available at: http://www.onenation.org/0011/112000a.htm 13

Joanne Jacobs, *The Education of J*A*I*M*E C*A*P*E*L*L*A*N: English Learner Success in California Schools.* Lexington Institute. Arlington, VA, 2008, available at: http://lexingtoninstitute.org/docs/Joanne%20Jacobs%20Paper%20-%20June%202008.pdf 11, 12

Massachusetts Bilingual Education Commission, *Striving for Success: The Education of Bilingual Pupils: A Report of the Bilingual Education Commission.* Boston, 1994. 7

Rita Montero, "A Tale of Two Tongues," *Denver Post*, May 25, 1997, available at: www.onenation.org/1997/052597.html 12

New York City Board of Education, *Educational Progress of Students in Bilingual and ESL Programs: a Longitudinal Study, 1990-1994*, available at: http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/13/9a/d1.pdf 10

PBS Online Newshour, "Double Talk," *Newshour Transcript*, Sept. 21, 1997, available at www.pbs.org/newshour/bb/education/july-dec97/bilingual_9-21.html 13

Rosalie Pedalino Porter, FORKED TONGUE: THE POLITICS OF BILINGUAL EDUCATION, 2nd ed. (1996) 3

Christine Rossell, et al., *Bilingual Education in Massachusetts: The Emperor Has No Clothes*, Pioneer Institute, Boston, Massachusetts, 1996, available at: http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/15/3d/04.pdf..... 7, 9

Kelly Torrance, *Immersion Not Submersion: Lessons from Three California Districts' Switch From Bilingual Education to Structured Immersion*, Vol. II. Lexington Institute, Arlington, VA, 2006, available at: http://lexingtoninstitute.org/docs/707.pdf 11

U.S. Dept. of Education, "Title III--Language Instruction For Limited English Proficient And Immigrant Students Language Instruction for Limited English Proficient and Immigrant Students (III)," *No Child Left Behind: A Desktop Reference*, available at: www.ed.gov/admins/lead/account/nclbreference/page_pg30.html..... 16, 36

INTEREST OF AMICI

The American Unity Legal Defense Fund is an independent, national, non-profit educational organization dedicated to preserving our historical unity as Americans into the 21st Century.[1] www.americanunity.org. AULDF has filed *amici curiae* briefs in this Court, including in *Mohawk Industries v. Williams*, No. 05-465 (brief of the Immigration Political Action Committee and five other organizations), and *Crawford v. Marion County Election Board*, Nos. 07-21, 07-25.

The English Language Political Action Committee is an independent, bipartisan national committee devoted to promoting English as the Official Language.

ProEnglish is a member-supported, national, non-profit organization working to educate the public about the need to protect English as our common language and to make it the official language of the United States. www.proenglish.org. ProEnglish has been active in the courts, including providing essential support to proponents of an Arizona initiative to make English the official language. *Arizonans for Official English v. Arizona*, No. 95-974.

The Center for Equal Opportunity is a national, non-profit organization which opposes

---

[1] Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part, no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief, and no person other than the *amici curiae* or their counsel made such a monetary contribution. All parties have consented to the filing of this brief.

bilingual education, because it segregates students by national origin, encourages identity politics, and fails to teach children English. www.ceousa.org. CEO has assisted parents of English Language Learners to challenge ineffective bilingual education programs in several states.

PRELIMINARY STATEMENT

The decision below rests on two fundamental errors:

- A misunderstanding and misapplication of the *Castaneda* test long used to evaluate claims under the Equal Educational Opportunities Act ("EEOA"); and,
- A misunderstanding of the relationship between the EEOA and Title III of the No Child Left Behind Act ("NCLB").

Both errors, described in more detail below, stem from the failure of the Ninth Circuit to understand the evolution in methods for teaching English Language Learners. Demonstrating the errors requires a brief description of the three-decade-long movement from "bilingual education" to more effective English Immersion instruction.

"[T]he debate is a neutral one, about which system will provide LEP [Limited English Proficient] children with the best education to enable them to function as American citizens and enjoy the opportunities and privileges of life in the United States." *Valeria v. Davis,* 307 F.3d 1036, 1041 (9th Cir. 2002), *quoting*, *Valeria G. v. Wilson,* 12 F.Supp.2d 1007, 1014-15 (N.D. Cal. 1998) ("This court cannot discern from the face of Proposition 227 any hidden agenda of racial or national origin discrimination against any group").

The movement from "bilingual education" to "English language acquisition" is, to the leading authorities, a civil rights and enabling issue:

> Without competence in the standard language of the society, immigrants . . . are at a disabling disadvantage, unable to share in the economic opportunities of a democratic society. . . . The sooner this enabling skill is acquired, the sooner children can join in the full life of their school and community.

Rosalie Pedalino Porter, FORKED TONGUE: THE POLITICS OF BILINGUAL EDUCATION, 2nd ed. (1996), at 254.

A. "Bilingual Education:" Teaching English Language Learners in Their Native Languages:

Before *Lau v. Nichols*, 414 U.S. 563 (1974), efforts to teach English Language Learners were haphazard or non-existent. In *Lau*, for example, this Court noted that of 2,856 children of Chinese ancestry in the San Francisco school system who did not speak English, 1,800 received no supplemental instruction to teach them English. *Lau*, 414 U.S. at 564. California law at the time provided for assistance to those who could not speak English, but at the discretion of the school system. 414 U.S. at 565.

Justice Douglas, writing for the Court, found that the failure to provide at least some assistance violated Section 601 of Title VI of the Civil Rights Act of 1964, because it "denies them a meaningful opportunity to participate in the educational program." 414 U.S. at 568. This Court did not

mandate any particular form of assistance for language-minority children:

> No specific remedy is urged upon us. Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another. There may be others. Petitioners ask only that the Board of Education be directed to apply its expertise to the problem and rectify the situation.

414 U.S. at 564-65.

One early attempt at teaching English Language Learners was "bilingual education." "'Bilingual education/native language instruction' means a language acquisition process for students in which *much or all instruction, textbooks, or teaching materials are in the child's native language* other than English." A.R.S. § 15-751.1 (2008) (emphasis added).

"Bilingual programs make use of students' native language in the classroom while developing English." Arizona Dept. of Education, *The Effects of Bilingual Education Programs and Structured English Immersion Programs on Student Achievement: a Large-Scale Comparison*, July 2004, at 1.

B. Bilingual Education Was Preferred by Federal Policies, But Proved Largely Ineffective:

In the Bilingual Education Act of 1974, 20 U.S.C. § 880b *et seq.* (1976), Congress expressly directed that the state and local agencies receiving funds under the Act were free to develop their own

programs. Conf.Rep. No. 93-1026, 93d Cong., 2nd Sess. (1974), *reprinted* in (1974) U.S.Code Cong. & Ad.News 4093, 4206.

The federal Department of Health, Education and Welfare, however, issued the so-called "*Lau* Guidelines," which promoted the use of bilingual education. "Following the Supreme Court's decision in *Lau*, HEW developed the '*Lau* Guidelines' as a suggested compliance plan for school districts which, as a result of *Lau*, were in violation of Title VI because they failed to provide any English language assistance to students having limited English proficiency." *Castaneda v. Pickard*, 648 F.2d 989, 1006 (5th Cir. 1981) ("*Castaneda*"). "Under the *Lau* Guidelines, plaintiffs argue, 'pressing English on the child is not the first goal of language remediation.'" *Id.*

> The *Lau* Guidelines were the result of a policy conference organized by HEW; these guidelines were not developed through the usual administrative procedures employed to draft administrative rules or regulations. The *Lau* Guidelines were never published in the Federal Register. Since the Department itself in its administrative decision found that RISD's [the Raymondville Independent School District's] departure from the *Lau* Guidelines was not determinative of the question whether the district complied with Title VI, we do not think that these guidelines are the sort of administrative document to which we customarily give great deference in our determinations of compliance with a statute.

Id.

Nevertheless, most federal funding and school system pedagogical decisions assumed the *Lau* Guidelines as a federal mandate, and suits, including the landmark *Castaneda* case, were brought alleging violations of the Guidelines. *Id.*

Over time, these bilingual education programs proved inadequate to teaching children either English or subject matter. In 1981, the U.S. Department of Education concluded that "the case for the effectiveness of 'Transitional Bilingual Education' is so weak that exclusive reliance on this instructional method is clearly not justified." Keith Baker, *et al.*, *Effectiveness of Bilingual Education: A Review of the Literature*, Technical Analysis Report Series, U.S. Dept. of Education, at 8 ("Dept. of Education Study").

In 1985, the Massachusetts Board of Education concluded that "it appears that bilingual programs *both* segregate them *and* fail to teach a substantial proportion of them the skills which, according to the *Lau* decision, are essential." Commonwealth of Massachusetts Board of Education, *Report No. 5 to the United States District Court, District of Massachusetts on Boston School Desegregation*, Vol. 2, July 15, 1985, at 74 (emphasis in original).

In 1992, a California State study examined 20 years of bilingual education, and found no evidence that native language instruction is beneficial, and also found that students are kept in bilingual education programs for too many years. Paul Berman, *et al.*, *Meeting the Challenge of Language Diversity: An Evaluation of Programs for Pupils of Limited Proficiency in English*, BW Associates, Berkeley, California, 1992, at 38.

In 1994, the Massachusetts Bilingual Education Commission analyzed 23 years of bilingual

education, and concluded that there was no evidence that "transitional bilingual education" programs produced good results. Massachusetts Bilingual Education Commission, *Striving for Success: The Education of Bilingual Pupils: A Report of the Bilingual Education Commission,* Boston, 1994.

In 1996, the Rossell/Baker study analyzed 76 reliable research studies on bilingual education, concluding there is no evidence that bilingual education programs are superior for teaching either English or subject matter. Christine Rossell, et al., *Bilingual Education in Massachusetts: The Emperor Has No Clothes*, Pioneer Institute, Boston, Massachusetts, 1996 ("Rossell").

In 1998, the National Research Council of the National Institutes of Medicine reviewed 29 years of bilingual education and concluded that there was no long-term advantage in teaching literacy in a child's native language and no negative effects from teaching English language literacy first. Commission on Behavioral and Social Sciences and Education, National Research Council, Institutes of Medicine *Educating Language Minority Children*, National Academy Press, Washington, D.C., 1998.

C. Some Schools Introduced New "English Immersion" Teaching Methods:

Some schools began using an alternative method of instruction: "immersing" the students in English, and providing special assistance in other languages only when needed. In 1981 the U.S. Department of Education described the rationale:

> The commonsense observation that children should be taught in a language they

> understand does not necessarily lead to the conclusion they should be taught in their home language. They can be successfully taught in a second language if it is done right. The key to successful teaching in the second language seems to be to insure that the second language and subject matter are taught simultaneously so that subject content never gets ahead of language. Given the American setting, where the language-minority child must ultimately function in an English-speaking society, carefully conducted second-language instruction in all subjects may well be preferable to bilingual methods.

Dept. of Education Study, at 8.

A 1996 Massachusetts review of 76 studies describes the English Immersion classroom:

> The language of instruction in a structured immersion program is English at a level the child can understand in a self-contained classroom of LEP students who are at approximately the same level of English language knowledge and the same age. The children in a structured immersion classroom do not have to be of the same language background, but the teacher should be trained in second language acquisition techniques. These programs should be fully integrated into regular schools so that students are exposed to English speakers on the playground, in the cafeterias, the halls, assemblies, and other areas before, during, and after school. LEP students should probably not remain in self-contained classrooms for more than a year, even if the language of instruction is English.

Rossell, *supra*, at 9.

Arizona law, enacted by Proposition 203,[2] defines one such method, known as Structured English Immersion ("SEI"):

> "Sheltered English immersion" or "structured English immersion" means an English language acquisition process for young children in which nearly all classroom instruction is in English but with the curriculum and presentation designed for children who are learning the language. Books and instructional materials are in English and all reading, writing, and subject matter are taught in English. Although teachers may use a minimal amount of the child's native language when necessary, no subject matter shall be taught in any language other than

---

[2] "Proposition 203 largely abolished bilingual education, replacing it with sheltered English immersion, a teaching method 'in which nearly all classroom instruction is in English but with the curriculum and presentation designed for children who are learning the language.'" *Flores v. Arizona*, 516 F.3d 1140, 1149 (9th Cir. 2008).

Contrary to the lower court's assertion about bilingual education being "abolished," bilingual education teaching methods are still available in Arizona. A.R.S. §§ 15-752, 15-753 (2000). Structured English Immersion ("SEI") is the default instructional method; children who obtain waivers, based on educators' evaluations and parental consent, may be placed in bilingual education classrooms. *Id.* Approximately 7,900 students obtained waivers and participated in bilingual education programs in the 2002-03 academic year. Arizona Dept. of Education, *The Effects of Bilingual Education Programs and Structured English Immersion Programs on Student Achievement: a Large-Scale Comparison*, July 2004. ("Arizona Student Achievement Study"), at Table 1, P. 5. More than 65,000 students participated in SEI programs. *Id.*

> English, and children in this program learn to read and write solely in English.

A.R.S. § 15-751.5 (2008).

D. Structured English Immersion Proved More Successful Than Bilingual Education:

In 1992, the Research in English Acquisition and Development Institute studied El Paso, Texas's, "Bilingual Immersion Project," and found that, over the ten-year study period, Limited English Proficiency children in English immersion classes consistently outperformed children in native language instruction classes in both learning English and in subject matter. Russell Gersten, *et al.*, *Bilingual Immersion: A Longitudinal Study*, READ Institute, Washington, D.C. 1992.

In 1994, the New York City Board of Education found that students in English as a Second Language classes (similar to immersion programs) exited their special program faster and did better in mainstream classrooms than students taught in their native language. New York City Board of Education, *Educational Progress of Students in Bilingual and ESL Programs: a Longitudinal Study, 1990-1994.*

The Arizona Department of Education reported that, in academic year 2002-03, "[T]hose students in SEI programs significantly outperformed bilingual students in 24 out of 24 comparisons. . . . [B]ilingual students are more than a year behind their SEI counterparts in seventh and eighth grade." Arizona Student Achievement Study, at 3.

Similar results were achieved in California.

> California made headlines across the country when test scores were released after the passage of Proposition 227. Opponents of the law had predicted it would spell disaster for English learners. But quite the opposite occurred. Only a quarter of English learners scored in the top two proficiency categories on the California English Language Development Test (CELDT) in 2001, shortly after Proposition 227 was implemented, and the first year the exam was given. By 2005, almost half did – 47 percent.

Kelly Torrance, *Immersion Not Submersion: Lessons from Three California Districts' Switch From Bilingual Education to Structured Immersion*, Vol. II. Lexington Institute, Arlington, VA, 2006, at 4.

In addition, those who completed the program sometimes outdid native English-speakers in test performance.

> A larger group of students start as English Learners but achieve proficiency, making them Reclassified Fluent English Proficient (RFEP). These students "do just as well as, and, in some cases, even better than non-EL students on every state standardized academic test, including the California Standards Test, the Stanford Assessment Test and the California High School Exit Exam," notes the 2007 Evaluation Report on the California High School Exit Exam (CAHSEE) by Human Resources Research Organization.

Joanne Jacobs, *The Education of J*A*I*M*E C*A*P*E*L*L*A*N: English Learner Success in California Schools*. Lexington Institute. Arlington, VA, 2008, at 5.

"Remarkably, 52 percent of reclassified students passed the college-prep courses required by the University of California and California State University systems in 2003, compared to only 32 percent of students who speak English as their first language." *Id.*, at 7.

E. Parents and Educators Began Rejecting Bilingual Education Programs and Advocating for English Immersion Programs:

Given these dramatic differences in success rates, it was inevitable that parents and caring educators began clamoring for more successful programs for English Language Learners. "Over the past few years, the Committee has heard a growing number of complaints from parents whose children have been placed and retained in bilingual education courses without their permission or knowledge. In many instances, these parents faced great resistance in their efforts to remove their children from such programs." Comm. On Ed. & the Work Force, "No Child Left Behind Act of 2001," H.R. Rep. 107-63, Pt. 1, at 277.

One was Rita Montero, a member of the Denver, Colorado, School Board, and once a supporter of bilingual education, who changed her view: "As a mother whose child was forced to stay in this program, I know its problems first-hand."[3] Montero's son, Camilo, was put into a bilingual education class, at her request. Her second-grade son had been doing

---

[3] Rita Montero, "A Tale of Two Tongues," *Denver Post*, May 25, 1997.

fractions and adding three digit numbers, but his bilingual education class was far behind Camilo's capabilities: "So I said to the teacher this is it; I want him to be taken out and put in an English-speaking class."[4]

Similar parent and educator disquiet over bilingual education's failures led to successful voter initiatives in California (1998), Arizona (2000), and Massachusetts (2002):

> Well, the overwhelming practical evidence is that bilingual education has failed on every large scale case that's been tried in the United States, in particular in California. The origins of this initiative was the case last year of a lot of immigrant Latino parents in downtown LA, who had to begin a public boycott of their local elementary school to try to force the school to give their children the right to be taught English, which the school was denying.

"Double Talk," *supra* (Statement of Ron Unz). The Ninth Circuit repeatedly upheld California's Proposition 227. *Valeria v. Davis*, *supra*; *Calif. Teachers Ass'n v. State Bd. Of Ed.*, 271 F.3d 1141 (9th Cir. 2001).

The California reform movement stimulated Arizona's Proposition 203, which passed with 63% of the vote on the Nov. 2000 ballot. Daniel Gonzalez, "Arizona Win Encourages Bilingual Ed Opponents," *Arizona Republic*, Nov. 20, 2000, A-1.

In 2002, Massachusetts voters adopted Question 2 by a vote of 68% to 32% of those voting.

---

[4] PBS Online Newshour, "Double Talk," *Newshour Transcript*, Sept. 21, 1997 ("Double Talk").

Elections Division, State of Massachusetts, "Massachusetts 2002 Election Ballot Question Results".

> Lincoln Jesus Tamayo, statewide chair of English for the Children of Massachusetts, argued that a ballot initiative was the only solution. "As a Latino immigrant child who arrived in America speaking no English, I know the importance of learning that language. As a high school principal, I have seen the dismal results of our current so-called bilingual programs, which teach English much too slowly. And as Chairman of the Massachusetts Bilingual Education Advisory Council, I recognized the hopelessness of legislative efforts to reform this dreadful system of Spanish-only instruction. We've already lost too many generations of Latino students; the 'English for the Children' initiative is their only chance."
>
> The views of Mr. Tamayo were seconded by those of Co-Chair Rosalie Pedalino Porter, herself an immigrant child, former director of bilingual programs for Newton, MA, and author of *Forked Tongue*, a powerful critique of bilingual education. "I learned English as a child in school, but was later forced to administer a system which prevented other immigrant children from doing the same. After wasting fifteen years trying to reform bilingual programs, I've decided we must end them instead."

English for the Children of Massachusetts, *Ballot Initiative Campaign Launched to Dismantle Bilingual Education in Massachusetts*, July 31, 2001.

F. Federal Policy Preferences Changed to Favor English Language Acquisition:

This evolution in teaching methods gradually penetrated federal policy, leading to the end of policies and "*Lau* guidelines" preferring bilingual education. In 2001, Congress enacted Title III of the No Child Left Behind Act, Pub.L. No. 107-110, 115 Stat. 1425 ("NCLB").

The NCLB reversed the federal educational priorities for English Language Learners and promoted English language acquisition. *See, e.g.*, Section 1072 of NCLB, replacing "Office of Bilingual Education and Minority Languages Affairs" and "Office of Bilingual Education" in the Department of Education Organization Act (20 U.S.C. 3401 *et seq.*), with "Office of English Language Acquisition, Language Enhancement, and Academic Achievement for Limited English Proficient Students".

> Yet we know what happened to bilingual education. It got off track. Instead of kids learning English, we ended up isolating kids, took them on a train track that took them to their language and left them there, put them in schools and classrooms where they basically were being taught in their language and they were not being allowed to learn English essentially, or they were not being asked to learn English.

147 Cong. Rec. S13328 (Dec. 17, 2001)(Statement of Sen. Gregg).

The new Title III of NCLB requires federal grantees "to help ensure that children who are limited English proficient, including immigrant

children and youth, attain English proficiency, develop high levels of academic attainment in English, and meet the same challenging State academic content and student academic achievement standards as all children are expected to meet." 20 U.S.C. § 6812(1).

Thus, where "[u]nder the *Lau* Guidelines, plaintiffs argue, 'pressing English on the child is not the first goal of language remediation'," *Castaneda*, 648 F.2d at 1006, under Title III of the NCLB, attaining English proficiency was the first goal. 20 U.S.C. § 6812(1).

The U.S. Department of Education describes the new NCLB requirements for schools as:

> School districts must use Title III funds to provide high-quality language instruction programs that are based on scientifically based research, and that have demonstrated that they are effective in increasing English proficiency and student achievement.
>
> Districts are required to provide high-quality professional development to classroom teachers, principals, administrators, and other school or community-based organizational personnel in order to improve the instruction and assessment of limited English proficient students.
>
> Districts are held accountable for making adequate yearly progress as described in Title I and meeting all annual achievement objectives.

U.S. Dept. of Education, "Title III – Language Instruction For Limited English Proficient And Immigrant Students Language Instruction for Limited English Proficient and Immigrant Students

(III)," *No Child Left Behind: A Desktop Reference* ("NCLB Desktop Reference").

Thus, America's methods for teaching English Language Learners have moved beyond ineffective bilingual education programs measured by "process" or "inputs", toward a result-oriented test of whether children are succeeding. The decision below missed this evolution:

> If anything, after 2000, when Arizona moved away from bilingual education and required most courses to be taught in English, regardless of students' language abilities, these challenges have become greater: a tenth grader, for example, who speaks no English but must pass a biology course taught entirely in English will require considerable assistance.

516 F.3d at 1169.

This statement, central to the Ninth Circuit's belief that more resources were necessary, does not reflect an understanding of the Structured English Immersion program, or its results. The essence of SEI programs is that students are given the assistance necessary, but based on an individual student's needs, not on an assumption that the student will not do well in an English-language curriculum.

SUMMARY OF ARGUMENT

The Ninth Circuit decision below made two fundamental errors:

- misunderstanding and misapplying the *Castaneda* test long used to evaluate claims under the Equal Educational Opportunities Act; and,

- misunderstanding Title III of the No Child Left Behind Act, and misapplying the relationship between the EEOA and Title III.

Both errors stem from the same root: a failure of the Ninth Circuit to understand the evolution in methods for teaching English Language Learners, described *supra*.

The three-part *Castaneda* test was formulated to permit courts to evaluate claims under the Equal Educational Opportunities Act, the post-*Lau* effort to insure that school systems made a "good faith" effort to assist English Language Learners. The Ninth Circuit attempted to apply the *Castaneda* test in this case, but did not understand it. As a result, the Ninth Circuit changed the *Castaneda* test from one focused on results, to one measuring inputs. Because demands for more money are limitless, this change mires the Ninth Circuit in inappropriate legislative decision-making, and contradicts the evolution of teaching methods now reflected in federal law.

In addition, the Ninth Circuit distorted and mis-applied the results test which is explicitly part of the *Castaneda* test. The lower court recited, but dismissed evidence that Arizona is achieving the kind of results sought in the No Child Left Behind Act and the EEOA.

Similarly, the decision below misunderstood the relationship between the EEOA and Title III of the NCLB. In the context of the evolution of teaching methods, described *supra*, Title III of the NCLB can be seen as the legislative ratification of the three-part *Castaneda* test. In particular, both the third prong of the *Castaneda* test and Title III require measurable results. The Ninth Circuit could not connect the two results tests, even though they are essentially the

same. Thus, the Ninth Circuit not only failed to understand the *Castaneda* test and how it applies to Arizona's program, but also how the EEOA and Title III harmonize toward the same goal.

Adopting the Ninth Circuit's new formulation of the EEOA might resurrect one of the chief criticisms of ineffective bilingual education programs: that they keep English Language Learners segregated longer than necessary, not only slowing their English language acquisition but impeding their ability to learn school subjects taught in English. Schools which see ELL assistance programs as means to squeeze additional funds out of reluctant legislatures would feel pressure to keep the students in the programs longer. This would mean that the Ninth Circuit would be promoting exactly what it purports to solve: keeping English Language Learners away from English proficiency.

ARGUMENT

I. THE DECISION BELOW DISTORTS AND MISAPPLIES THE *CASTANEDA* TEST.

A. The Equal Educational Opportunities Act:

The Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1703(f), says, in relevant part: "No State shall deny equal educational opportunity to an individual . . . by – (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."

The legislative history of the EEOA "is very sparse, indeed almost non-existent." *Castaneda*, 648 F.2d at 1001. "The EEOA was a floor amendment to the 1974 legislation amending the Elementary and Secondary Education Act of 1965, 88 Stat. 338-41." *Id.*

The interpretation of Section 1703(f) has generally centered on the requirement that schools take "appropriate action to overcome language barriers."

> The difficult question presented by plaintiffs' challenge to the current language remediation programs in RISD is really whether Congress in enacting § 1703(f) intended to go beyond the essential requirement of *Lau*, that the schools do something, and impose, through the use of the term "appropriate action" a more specific obligation on state and local educational authorities.

Castaneda, 648 F.2d at 1008.

In *Serna v. Portales Municipal Schools*, 351 F.Supp. 1279 (D.N.M.1972), *aff'd on other grounds*, 499 F.2d 1147 (10th Cir. 1974), the district court found an unconstitutional denial of equal educational opportunity. The Tenth Circuit affirmed the decision on the non-constitutional ground of Section 601 of Title VI. The court further stated that because Section 601 gives a right to bilingual instruction, bilingual-bicultural education can be ordered. 499 F.2d at 1154.

The Tenth Circuit, in *Keyes v. School District No. 1*, 521 F.2d 465 (10th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976), criticized *Serna*, refused to order bilingual-bicultural education as a remedy, and

expressly held that a specific program of bilingual-bicultural education was not required by the Fourteenth Amendment. On the other hand, in *United States v. Texas Education Agency*, 532 F.2d 380, 398 (5th Cir.), *vacated sub nom. Austin Independent School District v. United States*, 429 U.S. 990 (1976), a certain form of bilingual-bicultural education was held to be a proper part of a remedy fashioned by the district court to eliminate de jure segregation. A similar holding where de jure segregation had existed was made in *United States v. Texas*, 342 F.Supp. 24 (E.D.Tex.1971), *aff'd*, 466 F.2d 518 (5th Cir. 1972).

The early judicial analysis and application reached perhaps its deepest point in *Guadalupe Organization, Inc. v. Tempe Elementary School Dist. No. 3*, 587 F.2d 1022 (9th Cir 1978). In *Guadalupe*, the Ninth Circuit was asked whether *Lau* and the HEW guidelines required Tempe, Arizona, "to provide all non-English-speaking Mexican-American or Yaqui Indian students attending district schools with bilingual-bicultural education" which, *inter alia*, "reflects the historical contributions of people of appellants' descent to the State of Arizona and the United States." *Guadalupe*, 587 F.2d at 1024.

The Ninth Circuit rejected the request for bilingual-bicultural education:

> We hold that the appellees fulfilled their equal protection duty to children of Mexican-American and Yaqui Indian origin when they adopted measures, to which the appellants do not object, to cure existing language deficiencies of non-English-speaking students. There exists no constitutional duty imposed by the Equal Protection Clause to provide

> bilingual-bicultural education such as the appellants request.

587 F.2d at 1026-27. The Ninth Circuit similarly rejected claims under Section 601 of the Civil Rights Act of 1964 and under the EEOA. 587 F.2d at 1029-30.

The Ninth Circuit explained:

> Whatever may be the consequences, good or bad, of many tongues and cultures coexisting within a single nation-state, whether the children of this Nation are taught in one tongue and about primarily one culture or in many tongues and about many cultures cannot be determined by reference to the Constitution. We hold, therefore, that the Constitution neither requires nor prohibits the bilingual and bicultural education sought by the appellants. Such matters are for the people to decide.

587 F.2d at 1027.

B. The Fifth Circuit Crafted a Three-Part *Castaneda* Test to Evaluate EEOA Claims:

In 1981, the Fifth Circuit handed down the landmark decision in *Castaneda v. Pickard,* 648 F.2d 989 (5th Cir. 1981). The Raymondville, Texas, bilingual education program offered intensive language instruction, in addition to bilingual content instruction, for the first three years. "The articulated goal of the program is to teach students fundamental reading and writing skills in both Spanish and English by the end of third grade." 648 F.2d at 1004-

05. After the third grade, all instruction was in English, with teachers' aides and other assistance for language-minority children. Special programs, including English as a Second Language and special tutoring, were available to all children, with special emphasis on students who moved into the school district after the third grade. 648 F.2d at 1005.

The plaintiffs asserted that the Raymondville program did not comply with the requirements of Title VI, the EEOA, and the *Lau* Guidelines. 648 F.2d at 1006. "Specifically, plaintiffs contend that the articulated goal of the Raymondville program to teach limited English speaking children to read and write in both English and Spanish at grade level is improper because it overemphasizes the development of English language skills to the detriment of the child's overall cognitive development." *Id.*

The Fifth Circuit first swiftly disposed of the Title VI and *Lau* Guidelines questions.

> Whatever the deficiencies of the RISD's program of language remediation may be, we do not think it can seriously be asserted that this program was intended or designed to discriminate against Mexican-American students in the district. Thus, we think it cannot be said that the arguable inadequacies of the program render it violative of Title VI.

648 F.2d at 1007.

The Fifth Circuit then turned to the EEOA question:

> We think Congress' use of the less specific term, "appropriate action," rather than "bilingual education," indicates that Congress intended to leave state and local educational authorities a substantial amount of latitude in

> choosing the programs and techniques they would use to meet their obligations under the EEOA. However, by including an obligation to address the problem of language barriers in the EEOA and granting limited English speaking students a private right of action to enforce that obligation in § 1706, Congress also must have intended to insure that schools made a genuine and good faith effort, consistent with local circumstances and resources, to remedy the language deficiencies of their students and deliberately placed on federal courts the difficult responsibility of determining whether that obligation had been met.

648 F.2d at 1009.

The Fifth Circuit then formulated a three-part test which has guided reviews of bilingual education programs since its formulation:

> In a case such as this one in which the appropriateness of a particular school system's language remediation program is challenged under § 1703(f), we believe that the responsibility of the federal court is threefold. First, the court must examine carefully the evidence the record contains concerning the soundness of the educational theory or principles upon which the challenged program is based. . . .
>
> The court's second inquiry would be whether the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school. We do not believe that it may fairly be said that a school system is taking appropriate action to

> remedy language barriers if, despite the adoption of a promising theory, the system fails to follow through with practices, resources and personnel necessary to transform the theory into reality.
>
> Finally, a determination that a school system has adopted a sound program for alleviating the language barriers impeding the educational progress of some of its students and made bona fide efforts to make the program work does not necessarily end the court's inquiry into the appropriateness of the system's actions. If a school's program, although premised on a legitimate educational theory and implemented through the use of adequate techniques, fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome, that program may, at that point, no longer constitute appropriate action as far as that school is concerned. We do not believe Congress intended that under § 1703(f) a school would be free to persist in a policy which, although it may have been "appropriate" when adopted, in the sense that there were sound expectations for success and bona fide efforts to make the program work, has, in practice, proved a failure.

648 F.2d at 1009-10.

The *Castaneda* test continues to be the benchmark for evaluating challenges to programs to aid English Language Learners. The Fifth Circuit later applied the *Castaneda* test to a statewide

system. *United States v. Texas*, 680 F.2d 356, 371 (5th Cir. 1982). The Seventh Circuit similarly applied the *Castaneda* test. *Gomez v. Illinois State Bd. Of Education*, 811 F.2d 1030, 1041-42 (7th Cir. 1987) (EEOA applies to state as well as local agencies).

The plaintiffs and the court below used the *Castaneda* test in this case. "Flores alleged, consistent with *Castaneda* step two, that Arizona had 'failed to provide financial and other resources necessary for adequate implementation' of its ELL programs." 516 F.3d at 1146.

C. The Decision Below Distorts and Misapplies the *Castaneda* Test:

The lower court's opinion misquotes and misunderstands the *Castaneda* test. Because the court below apparently did not understand the Fifth Circuit's careful analysis in *Castaneda*, its additions converted a "good faith" test into a numerical "resources" test, placing the court in the position of dictating appropriations, rather than evaluating a program.

The court below described the *Castaneda* test as:

> The *Castaneda* framework is three-fold: First, courts must be satisfied that the "school system is purs[uing] a program informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy." *Castaneda*, 648 F.2d at 1009. Second, "the programs and practices actually used by a school system [must be] reasonably calculated to implement effectively the educational theory adopted by

> the school." *Id.*, at 1010. *There must, in other words, be sufficient "practices, resources and personnel ... to transform the theory into reality." Id.* Third, even if theory is sound and *resources are adequate*, the program must be borne out by practical results. *Id.*

516 F.3d at 1146 (emphases added).

The highlighted language is the Ninth Circuit's distortion of the *Castaneda* test. An analysis of the Arizona programs under the three *Castaneda* prongs illustrates the effect of this switch from substantive analysis to analysis of "process:"

1. ***THEORY:*** *Proposition 203 Adopted a Recognized Educational Theory.*

The first *Castaneda* test is whether the program uses a recognized educational theory. Arizona's Proposition 203 uses a theory proven successful in California, and very similar to that adopted two years later by Congress in Title III of the NCLB Act. No one in this case disputes that Arizona's educational theory is recognized.

2. ***"GOOD FAITH" IMPLEMENTATION:*** *Arizona Has Implemented the Program Appropriately.*

This second *Castaneda* prong is the crux of the plaintiffs' challenge in this case. 516 F.3d at 1146. The Ninth Circuit has converted the second prong of the *Castaneda* test from one focused on implementation of theory into a resources test. "ELL students need extra help and that costs extra money." 516 F.3d at 1169.

The Ninth Circuit, using its theory that "challenges have become greater" under Arizona's

SEI program, 516 F.3d at 1169, didn't recognize the differences between the old bilingual education program and more modern approaches. The Ninth Circuit excerpted the second prong of the *Castaneda* test to look to specific dollar inputs rather than good faith efforts:

> Second, "the programs and practices actually used by a school system [must be] reasonably calculated to implement effectively the educational theory adopted by the school." *Id.*, at 1010. *There must, in other words, be sufficient "practices, resources and personnel ... to transform the theory into reality."*

Id., emphasis added.

By removing words, the Ninth Circuit converted the second prong into a test of whether the theory could become "reality." This is a results test. The only way to keep the lower court's version of the second prong from being a superfluous results test would be if it were construed solely as an "inputs" test, similar to the old *Lau* Guidelines. Yet the *Castaneda* court, as noted above, summarily rejected the *Lau* Guidelines as a measure to judge compliance with the EEOA. 648 F.2d at 1007.

The futility of the Ninth Circuit's "resources" test can be seen in a comparison of the Nogales schools and those of "the more affluent Scottsdale Unified School District [which] spends more than twice as much money as does [Nogales] for its ELL students, yet Scottsdale's ELL 10th graders score worse on Arizona's AIMS academic achievement tests than [Nogales's] ELL 10th graders." Brief of Petitioner Superintendent ("Superintendent's Br.") at 43 n. 19. Adding more resources is not an adequate measure of implementation or of results.

The second prong is not, in fact, a resources test. It is a balancing test of implementation. What *Castaneda* actually said was that:

> Congress also must have intended to insure that schools made a *genuine and good faith effort, consistent with local circumstances and resources*, to remedy the language deficiencies of their students. . . .
>
> The court's second inquiry would be whether the *programs and practices* actually used by a school system are *reasonably calculated* to implement effectively the educational theory adopted by the school.

648 F.2d at 1009 (emphasis added).

Arizona has implemented its Structure English Immersion program appropriately. It has passed legislation to implement the voters' decision. 516 F.3d at 1167. Nogales schools score in the top ranks of Arizona schools. Pet. App., at 363a-366a. Even the Ninth Circuit notes that Arizona has changed its programs to meet the needs of its English Language Learners in these new programs. "[M]any of these specific problems have been solved by better management in NUSD, and because school funding has generally increased. . . ." 516 F.3d at 1168.

The *Castaneda* test is one of "genuine and good faith effort." The Ninth Circuit is familiar with "good faith" tests regarding the implementation of English Language Learner programs. *California Teachers Ass'n*, 271 F.3d at 1154-55 (upholding California's Prop. 227, in part, by looking at a variety of "good faith" tests).

The Ninth Circuit did not use its own "good faith" test, or the *Castaneda* "good faith implementation" test in this case. Perhaps the Ninth

Circuit believed that it could evaluate and disregard competing resource claims to satisfy the requirements of the EEOA, but having both ignored the evolution in education theory and practice and made a flawed assumption about the resources needed to implement English immersion programs, the Ninth Circuit was in no position to judge whether Arizona's effort was "genuine" or in "good faith." Thus, it had to look solely to a dollar-input test.

The difficulty with the "process mentality" below was predicted by the Fifth and Seventh Circuits:

> Among these are such questions as how broad a power of "de novo" review and revision may be exercised by a district court over language barrier programs, consistent with the rule that Congress cannot invest Article III courts with jurisdiction to "exercise functions which are essentially legislative or administrative."

Castaneda by Castaneda v. Pickard, 680 F.2d 456, 471 n. 24 (5th Cir. 1986); *Gomez*, 811 F.2d at 1041 ("we must be careful not to substitute our suppositions for the expert knowledge of educators or our judgment for the educational and political decisions reserved to the state and local agencies").

Demands for funds are endless. Schools can always find a reason to "need" more funds. Determining appropriations levels by balancing these competing demands is one of the "quintessentially legislative" functions. *Sorenson v. Secretary of Treasury of U.S.*, 475 U.S. 851, 865 (1986).

Because it failed to understand the nature of the second prong of the *Castaneda* test, the decision below both inappropriately muddied the test itself

and unnecessarily injected itself into legislative resources decisions. The *Castaneda* test was carefully drawn to avoid separation of powers issues while protecting English Language Learners; the Ninth Circuit's ambiguous rewrite was not.

3. ***RESULTS:*** *Arizona's SEI Program is Achieving Results Better Than Its Prior Bilingual Education Program.*

As shown by the long evolution of English Language Learner teaching, the third prong of the *Castaneda* test is perhaps the most important: does the program get results?

The EEOA does not establish measures for determining results. Title III of the No Child Left Behind Act does: "to help ensure that children who are limited English proficient, including immigrant children and youth, attain English proficiency, develop high levels of academic attainment in English, and meet the same challenging State academic content and student academic achievement standards as all children are expected to meet." 20 U.S.C. § 6812(1).

Arizona does seem to be getting results. Arizona's ELLs who have successfully completed Arizona's new "Structured English Immersion" program perform better on tests of mathematics, and English language writing and reading skills than do native-English-speaking children. Accountability Division, Research and Evaluation Section, Arizona Dept. of Education, "State Report Cards," Dec. 29, 2008.

For example, in Fiscal Year 2007, 82% of ELLs in their second year of classification as English Proficient ("CFEP2") passed their Arizona

Instrument to Measure Standards ("AIMS") test in writing in English, compared to only 78% of native English speakers. *Id.* 71% of the CFEP2 students passed their AIMS math test, compared to 68% of native English speakers. *Id.* In Fiscal Year 2008, the achievement figures were comparable between ELLs and native speakers; for example, the AIMS pass rate for CFEP2 students was 72% in math, compared to 74% for native English speakers. *Id.*

The Ninth Circuit dismissed the evidence of success, putting these "encouraging" results in a footnote, 516 F.3d at 1170 n. 38, and claiming that "the record does not demonstrate that NUSD is succeeding in rapidly and permanently reclassifying ELL students, nor on the time it takes to reclassify students." 516 F.3d at 1170.

Instead, the lower court simply decried a lack of resources:

> A district in which the *majority* of ELL tenth graders fail to meet state achievement standards while the majority of native English speakers pass is not one whose performance demonstrates that the state is adequately funding ELL programs and so warrants relief from judgment.

516 F.3d at 1170 (emphasis in the original). Given the undisputed evidence that graduates of the program do as well or better than the "majority of English speakers", comparing those who haven't completed the program is premature at best. Otherwise, the lower court would be demanding instantaneous results.

Leaving aside the comparison between different groups, this conclusion doesn't seem to comport with the record. Pet. App., at 363a-366a

(Nogales Unified School District schools rank high on Arizona test scores); Brief for Petitioners ("Legislature's Br.") at 22, 45-46 (describing new programs and resources in Nogales schools), 48 (describing ELL performance on tests).

Again, the Ninth Circuit's position may be dictated by its misunderstanding and mischaracterization of the *Castaneda* test. The opinion below described the third prong as: "Third, even if theory is sound and resources are adequate, the program must be borne out by practical results." 516 F.3d at 1146.

This is not an accurate description, as it substitutes "resources are adequate" for what the *Castaneda* test actually measures:

> Finally, a determination that a school system has adopted a sound program for alleviating the language barriers impeding the educational progress of some of its students *and made bona fide efforts to make the program work* does not necessarily end the court's inquiry into the appropriateness of the system's actions. If a school's program, although premised on a legitimate educational theory and *implemented through the use of adequate techniques*, fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome, that program may, at that point, no longer constitute appropriate action as far as that school is concerned.

648 F.2d at 1010 (emphasis added).

The *Castaneda* results test does not include the word "resources," nor does it measure whether "resources are adequate." Instead it measures whether Arizona has "made bona fide efforts to make the program work," and whether, after a reasonable period of time, the program was "implemented through the use of adequate *techniques*." Not adequate "resources," but "adequate techniques." And the essential test, described twice in one paragraph, is whether Arizona had made "bona fide efforts to make the program work."

The last sentence of the *Castaneda* third prong was not mentioned by the Ninth Circuit: "We do not believe Congress intended that under § 1703(f) a school would be free to persist in a policy which, although it may have been 'appropriate' when adopted, in the sense that there were sound expectations for success and *bona fide efforts to make the program work*, has, in practice, proved a failure." 648 F.2d at 1010 (emphasis added).

The *Castaneda* court sought "bona fide efforts" to ensure that children who are limited English proficient, including immigrant children and youth, attain English proficiency, develop high levels of academic attainment in English, and meet the same challenging State academic content and student academic achievement standards as all children are expected to meet. This is the same standard set by the NCLB. This is also what language-minority parents have sought for many years, and, by the available evidence, this is what Arizona has apparently provided.

The lower court's failure to understand and apply the *Castaneda* test threatens to confuse schools and parents about the requirements for teaching

English Language Learners, leading to the same sort of pedagogical morass that followed the *Lau* Guidelines. This Court should not permit the decision below to undermine the needs of English Language Learners.

II. THE DECISION BELOW DISTORTS AND MISAPPLIES THE RELATIONSHIP BETWEEN THE EEOA AND THE NCLB.

The decision below similarly failed to understand the evolution of federal policy from the EEOA to Title III of the NCLB. The EEOA required "appropriate means to overcome language barriers." 20 U.S.C. § 1703(f). The later-passed Title III of the NCLB sets specific federal policy for what "means" are "appropriate" enough to deserve federal funding.

The *Castaneda* test is the long-standing measure of whether the EEOA is being satisfied. If the three goals of the NCLB are the same as the three prongs of the *Castaneda* test, then satisfying the NCLB means satisfying the EEOA. If that is true, the Ninth Circuit's opinion is fatally flawed.

A. The Goals of the EEOA and Title III of the NCLB Are The Same:

The *Castaneda* test requires, as shown *supra*, a recognized theory, appropriate implementation, and measurable results:

> We also laid down a three-step test for compliance with section 1703(f): Is the program based on an educational theory recognized as sound or at least as a legitimate experimental strategy by some of the experts in the field? Is it reasonably calculated to

> implement that theory? Has it, after being used for a time sufficient to afford it a legitimate trial, produced satisfactory results?

United States v. Texas, 680 F.2d at 371.

Title III of the No Child Left Behind Act sets three goals, which are essentially the same as the three prongs of the *Castaneda* test:

- scientifically-based theory;
- adequate implementation, including teacher development; and
- measurable results.

> School districts must use Title III funds to provide high-quality language instruction programs that are based on scientifically based research, and that have demonstrated that they are effective in increasing English proficiency and student achievement.
>
> Districts are required to provide high-quality professional development to classroom teachers, principals, administrators, and other school or community-based organizational personnel in order to improve the instruction and assessment of limited English proficient students.
>
> Districts are held accountable for making adequate yearly progress as described in Title I and meeting all annual achievement objectives.

NCLB Desktop Reference, *supra*.

B. Title III Is An Individually-Focused Civil Rights Law:

The court below dismissed the requirements of Title III as only applicable to schools, and not children:

> The EEOA is just such a rights-enforcing law. It requires states "to ensure that needs of students with limited English language proficiency are addressed," *Idaho Migrant Council v. Bd. Of Educ.*, 647 F.2d 69, 71 (9th Circ. 1981), by requiring them to remove barriers to equal participation in educational programs now rather than later, and it provides students with a right of action to enable them to enforce their rights, *see*, 20 U.S.C. § 1706 . . . The EEOA's concerns, in other words, lie fundamentally with the current rights of individual students, while NCLB seeks gradually to improve their schools.

516 F.3d at 1173.

The Ninth Circuit has it backwards. To a student trapped in an ineffective bilingual education program, like Rita Montero's son, Camilo, the NCLB is a civil rights law, "requir[ing] states 'to ensure that needs of students with limited English language proficiency are addressed,' . . . by requiring them to remove barriers to equal participation in educational programs now rather than later." 516 F.3d at 1173.

The sponsors of Title III explicitly thought their changes would aid individual students in achieving equality in American society:

> Our school system should not isolate kids and not allow them to learn English. So we change the bilingual program so now the stress in bilingual education is going to be teaching kids to learn English so that they can compete in our world, compete in America, and have a shot at the American opportunity.

147 Cong. Rec. S13328 (Dec. 17, 2001)(Statement of Sen. Gregg).

In addition, Title III focuses on individual students. In March 2006, Irene Moreno, head of the English Acquisition United for the Arizona Department of Education described the four strategies she believed accounted for the demonstrated success of Nogales schools:

- small Structured English Immersion classes that emphasized English language development;
- intervention strategies to assist individual students who needed special attention;
- tutoring before, during and after school; and
- software-based evaluation providing immediate feedback on individual students' needs.

Superintendent's Br., at 26. These strategies, which satisfy Title III, are focused on the "current rights of individual students" rather than "seek[ing] to gradually improve their schools." 516 F.3d at 1173.

C. The Ninth Circuit's Approach Could Harm, Not Help, Children:

The Ninth Circuit overlooked one major purpose of Title III: to insure accountability on the basis of measurable results. One reason for this emphasis is that, under the old bilingual education programs, children were kept in these ineffective programs far longer than necessary. *See, e.g.*, H.R. Rep. 107-63, Pt. 1, at 277.

If implemented, the Ninth Circuit's "input" approach, measured by dollars spent per English Language Learner in these programs, could lead to the old result. Schools would have an incentive to

keep students in the programs longer than necessary, in order to attract more education funding. That would violate the purposes of both the EEOA and Title III of the NCLB: to teach children English and move them into parity with other students as quickly as possible.

Ironically, this perverse incentive to retain ELLs in special programs longer would run counter to the Ninth Circuit's principal criticism, noted above, that Arizona's programs do not "reclassify" students quickly enough. 516 F.3d at 1170 n. 38. Yet, history suggests that this is the likely result of the Ninth Circuit's own "put more money in" approach.

The Ninth Circuit's failure to understand the evolution of ELL education led it to a failure of analysis. This Court must understand the evolution, and the consequences, to see how these many disparate factors have come together to produce a success, not a failure, in Arizona.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request this Court to reverse the decision below.

BARNABY W. ZALL
Counsel of Record for Amici Curiae
Weinberg & Jacobs, LLP
11300 Rockville Pike, #1200
Rockville, MD 20852
(301) 231-6943

AMICUS CURIAE BRIEF

Nos. 08-294 and No. 08-289

IN THE

Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF ARIZONA,
Petitioner

and

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES AND PRESIDENT OF THE ARIZONA SENATE,
Petitioners

v.

MIRIAM FLORES, INDIVIDUALLY AND AS PARENT OF MIRIAM FLORES, MINOR CHILD; ROSA RZESLAWSKI, INDIVIDUALLY AND AS PARENT OF MARIO RZESLAWSKI, MINOR CHILD; STATE OF ARIZONA; AND MEMBERS OF THE ARIZONA STATE BOARD OF EDUCATION IN THEIR OFFICIAL CAPACITIES
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICI CURIAE BRIEF OF ASIAN AMERICAN JUSTICE CENTER, NATIONAL COUNCIL OF LA RAZA, *ET AL.*, IN SUPPORT OF RESPONDENTS

KAREN K. NARASAKI
VINCENT A. ENG
MEREDITH S.H. HIGASHI
ASIAN AMERICAN
JUSTICE CENTER
1140 Connecticut Ave., NW
Suite 1200
Washington, DC 20036
(202) 296-2300

ALAN S. GILBERT
Counsel of Record
RICHARD M. ZUCKERMAN
KATHERINE J. EVANS*
CHRISTOPHER H. LEE**
JONATHAN P. CHOCK*
SONNENSCHEIN NATH &
ROSENTHAL LLP
7800 Sears Tower
233 South Wacker Dr.
Chicago, IL 60606-6404
(312) 876-8000

* *Admitted only in California*
** *Admitted only in Arizona*

Counsel for Amici Curiae
[*Additional Amici listed on inside cover*]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

ADDITIONAL *AMICI CURIAE*

Asian American Institute

Asian Law Caucus

Asian Pacific American Legal Center of Southern California

Asian Pacific American Legal Resource Center

Boat People SOS

California Rural Legal Assistance Foundation

Child Care Law Center

Coalition of California Welfare Rights Organizations

Empire Justice Center

Isabel Framer

The Fred T. Korematsu Center for Law and Equality

Hmong National Development, Inc.

Japanese American Citizens League

Legal Aid Association of California

National Korean American Service & Education Consortium

Organization of Chinese Americans, Inc.

Sikh American Legal Defense and Education Fund

South Asian Americans Leading Together

Southeast Asia Resource Action Center

The Watsonville Law Center

TABLE OF CONTENTS

STATEMENT OF INTEREST OF AMICI CURIAE..1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

A. CONTINUED ENFORCEMENT OF THE EQUAL EDUCATIONAL OPPORTUNITIES ACT IS CRITICAL TO GIVE ENGLISH LANGUAGE LEARNERS A FAIR CHANCE IN OUR SOCIETY. 5

1. **Equal Access To Public Education Is A Fundamental Civil Right.** 6

2. **There Is Still A Wide Achievement Gap Between ELL Students And Native English Speakers.** 8

a. Providing Educational Opportunities To ELL Students Is A National Issue Not Limited To A Few States. 8

b. Native English Speakers Continue To Outscore ELL Students On Tests..... 9

c. Effective ELL Programs Increase The Number Of High School Graduates. 11

3. **Effective ELL Programs Address The Needs Of The Changing Population of U.S. Schools.** 12

B. EFFECTIVE ENGLISH LANGUAGE LEARNER PROGRAMS THAT FOCUS ON ENGLISH

PROFICIENCY FOR STUDENTS ARE CRITICAL FOR SUCCESSFUL IMMIGRANT INTEGRATION..... 14

1. **English Proficiency Is Critical To Social, Economic And Familial Integration.**..... 14

2. **Learning English Is Most Effective When Children Are Taught As Early As Possible.** 15

3. **Effective ELL Programs Benefit Society As A Whole.**..... 17

C. THE COURT SHOULD NOT CONSIDER COMPLIANCE WITH THE NCLB EQUIVALENT TO COMPLIANCE WITH THE EEOA..... 20

D. AMICI IN SUPPORT OF PETITIONER IMPROPERLY SEEK TO REFRAME THIS CASE INTO A DEBATE ABOUT EDUCATIONAL THEORY..... 26

CONCLUSION 30

APPENDIX A 1-A

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Alliance for Children v. City of Detroit Public Schools, 475 F.Supp.2d 655 (E.D. Mich. 2007) 21

Brown v. Board of Education, 347 U.S. 483 (1954) 6

Flores v. Arizona, 516 F.3d 1140 (9th Cir. 2008) 17, 26, 27

Fresh Start Academy v. Toledo Board of Education, 363 F.Supp.2d. 910 (N.D. Ohio 2005) 21

Gomez v. Illinois State Bd. of Education, 811 F.2d 1030 (7th Cir. 1987) 21

Lau v. Nichols, 414 U.S. 563 (1974) 3, 6, 7

Morales v. Shannon, 516 F.2d 411 (5th Cir. 1975) 21

FEDERAL STATUTES

20 U.S.C. §§ 1701, *et seq.* (1974) ..... *passim*

20 U.S.C. § 1703 ..... 7, 21

20 U.S.C. § 1706 ..... 20, 21

20 U.S.C. § 2000d, *et seq.* (1964) 6, 7

20 U.S.C. § 6847 25

20 U.S.C. § 7907(a) 22

20 U.S.C. §§ 7844 21

OTHER AUTHORITIES

Bureau of Labor Statistics, *Employment Projections: Pays to Play* (March 6, 2009) 18

California Department of Education News Release #08-117, Sept. 9, 2008, tbl.1..... 12, 19

Clive R. Belfield and Henry M. Levin, *The Return on Investment for Improving California's High School Graduation Rate* California Dropout Research Project (Aug. 2007) 19

Dr. James Thomas Tucker, *Waiting Times for Adult ESL Classes and the Impact on English Learners*, The National Association of Latino Elected and Appointed Officials Education Fund (June 2006) 16

Hoyt Bleakley and Aimee Chin, *What Holds Back the Second Generation? The Intergenerational Transmission of Language Human Capital Among Immigrants*, The Center for Comparative Immigration Studies, University of California, San Diego (Oct. 2004) 15

Jason Amos, *Dropouts, Diplomas, and Dollars: U.S. High Schools and the Nation's Economy*, Alliance for Excellent Education (Aug. 2008) 19

Jeanne Batalova, Michael Fix, Julie Murray, *Measures of Change: The Demography and Literacy of Adolescent English Learners*, Carnegie Corporation of New York (2007) 9, 13, 14, 15

Kenji Hakuta, Yuko Goto Butler, and Daria Witt, *How Long Does it Take English Learners to Attain Proficiency?* The University of California Linguistic Minority Research Institute (2000) 16

M.M. McMillen, P. Kaufman, & S. Klein, *Dropout rates in the United States: 1995* 18

Mellissa Lazarin, *A Race Against the Clock: The Value of Expanded Learning Time for English Language Learners*, Center for American Progress (Dec. 2008) 10, 11, 18

Michael Fix and Margie McHugh, *Pre K-12 Education of Immigrants and English Language Learners*, Migration Policy Institute (2008) 5

National Association for the Education of Young Children (NAEYC), *Screening and Assessment of Young English-Language Learners*, Supplement to the NAEYC Position Statement on Early Childhood Curriculum,

Assessment, and Program Evaluation (Summer 2005) 16

National Clearinghouse for English Language Acquisition and Language Instruction Educational Programs *The Growing Number of Limited English Proficient Students: 1995/96-2005/06* (2007) 13, 14

New York State Board of Regents, *Graduation Rates: Students Who Started 9th Grade in 2001, 2002 and 2003 and 2006-07 Regents Examination Results* (Aug. 11, 2008) 12, 18, 19

Richard Fry, *Explaining the English Language Learner Achievement Gap,* Pew Research Center (June 26, 2008) 8, 9

U.S. Census Bureau, *Earnings Gap Highlighted by Census Bureau Data on Educational Attainment* (2007) 18

U.S. Census Bureau, *Language Spoken at Home for the Population 5 Years and Over,* 2006 American Community Survey (2006) 5

United States Government Accountability Office, "No Child Left Behind Act: Assistance from Education Could Help States Better Measure Progress of Students with Limited English Proficiency," GAO-06-815, at 13 (July 26, 2006) 11, 23, 24, 25

U.S. Department of Education, *Fact Sheet: NCLB Provisions Ensure Flexibility and Accountability for Limited English Proficient Students*, (last modified Feb. 19, 2004).....23

William Myhill, *The State of Public Education and the Needs of English Language Learners in the Era of "No Child Left Behind,"* 8 J. Gender Race & Just. 393, 435-436 2004) 10

STATEMENT OF INTEREST OF AMICI CURIAE[1]

Asian American Justice Center ("AAJC")

AAJC is a national non-profit, non-partisan organization whose mission is to advance the human and civil rights of Asian Americans. AAJC focuses its work to promote civic engagement, forge strong and safe communities, and create an inclusive society on a local, regional, and national level. Collectively, AAJC and its Affiliates, the Asian American Institute, Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal, public policy, advocacy, and community education. A nationally recognized voice on immigration and immigrants' rights on behalf of Asian Americans, AAJC has long spearheaded advocacy and education in the community on matters affecting immigrant individuals and families. In particular, AAJC's Adult English Language Learning Program strives to shape legislative and public education policies to encourage support of English language acquisition and immigrant integration.

National Council of La Raza ("NCLR")

NCLR is a private, non-profit, non-partisan organization established in 1968 to reduce poverty and discrimination and improve life opportunities for Hispanic Americans. NCLR works toward this goal through two primary, complementary approaches:

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties' written consents to the filing of this brief have been filed with the Clerk of the Court.

capacity-building assistance to support and strengthen Hispanic community-based organizations and applied research, policy analysis, and advocacy. NCLR, which has a long history of working on behalf of English Language Learner ("ELL") students, recognizes that enforcement of the Equal Educational Opportunities Act is critical to the education of these students. Because 39 percent of Hispanic students are ELL, NCLR believes that denying educational opportunities to ELL students will have a negative effect on the educational outcomes of a large segment of the Hispanic student population.

Joining AAJC and NCLR as amici curiae in this brief are public interest, national advocacy, civil rights, and legal services organizations whose members or constituencies are affected on a daily basis by their ability to access effective ELL programs. The statements of interest for these additional *amici* are included in Appendix A.

SUMMARY OF ARGUMENT

The population of students in need of English language instruction continues to grow, state by state and nationwide. It is undisputed that English Language Learners ("ELL") who are provided with appropriate English instruction are better equipped to become productive members of society, by almost any measure. They are more likely to succeed academically, obtain a high school diploma, and facilitate the integration into the broader society of their families and communities. Despite these acknowledged benefits of effective English language instruction, the achievement gap between ELL students and their native English-speaking peers continues to grow.

The ability of ELL students to participate equally in a state's school system is a civil right, *see Lau v. Nichols*, 414 U.S. 563 (1974), and the Equal Educational Opportunities Act ("EEOA") provides an express remedy for an individual student whose rights are being violated by inadequate English language instruction. The Ninth Circuit properly affirmed the district court's holding that Arizona's arbitrary and capricious underfunding of programs for ELL students continued to violate the EEOA.

While there are many distinctions between the equality-based structure of the EEOA and the gradual, remedial framework of the No Child Left Behind Act ("NCLB"), one important difference is that the EEOA, a civil rights statute, provides individual students the right to rectify insufficient English language instruction through an express private right of action. If a state's compliance with

the NCLB were found to constitute compliance with the EEOA, the right to require a state to take appropriate action to ensure equal education for all might be lost. The Ninth Circuit properly held that the NCLB does not supersede the EEOA, and thus there was no change in law that justified providing relief from the district court's judgment.

Certain *amici* in support of Petitioners insist that the court below was influenced by a preference for bilingual instruction over English-immersion instruction. There is nothing in the Ninth Circuit's opinion that would so indicate. The Court of Appeals expressed no preference for bilingual education, clearly acknowledging that determining how to educate ELL students is within a state's discretion. Such attempts to reframe the issues before this Court should be disregarded.

ARGUMENT

A. CONTINUED ENFORCEMENT OF THE EQUAL EDUCATIONAL OPPORTUNITIES ACT IS CRITICAL TO GIVE ENGLISH LANGUAGE LEARNERS A FAIR CHANCE IN OUR SOCIETY.

In the 2005-06 school year, there were more than 5 million public school students with limited English proficiency in the United States ("English Language Learners" or "ELL")[2]—today, over three-quarters of ELL elementary school students and over one-half of ELL secondary school students are native-born American citizens.[3] This reflects our multicultural society. Over 54 million people living in the United States speak a language other than English at home,[4] and nearly 3 million children between ages 5 and 17 live in households that are deemed to be "linguistically isolated," meaning that no member of the household over age 14 speaks English very well.[5] Over 10.8

---

[2] NATIONAL CLEARINGHOUSE FOR ENGLISH LANGUAGE ACQUISITION AND LANGUAGE INSTRUCTION EDUCATIONAL PROGRAMS (NCELA), *The Growing Number of Limited English Proficient Students: 1995/96-2005/06* (2007), *available at* http://www.ncela.gwu.edu/policy/states/reports/statedata/2005LEP/GrowingLEP_0506.pdf.

[3] Michael Fix and Margie McHugh, *Pre K-12 Education of Immigrants and English Language Learners*, Migration Policy Institute, at 2 (2008), *available at* change.gov/page/-/open%20government/yourseatatthetable/20081217_mpi2.pdf.

[4] U.S. CENSUS BUREAU, *Language Spoken at Home for the Population 5 Years and Over*, 2006 American Community Survey, tbl.52 (2006), *available at* http://www.census.gov/compendia/statab/tables/09s0052.pdf.

[5] U.S. CENSUS BUREAU, *Language Spoken at Home for the Population 5 Years and Over*, 2006 American Community

million children between ages 5 and 17 (20.3% of the population for this age group) speak a language other than English at home, and over 2.8 million of those children speak English less than "very well."[6]

The large number of children with limited English proficiency presents an enormous challenge to our school system. Even with the major advances in equal education rights in the 55 years since *Brown v. Board of Education,* 347 U.S. 483 (1954), inequality persists in America's public school system between children who have learned English as their primary language and children who lack English proficiency.

Continued enforcement of the Equal Educational Opportunities Act ("EEOA") is critical to overcome this inequality and give English Language Learners a fair chance in our society.

1. Equal Access To Public Education Is A Fundamental Civil Right.

Since *Brown,* equal access to education has been identified as an imperative within America's public school systems. While legislatures and executives at both the state and federal level have recognized the importance of equal educational opportunity, the courts have had to play a continuing role to ensure that progress is made.

In *Lau v. Nichols,* 414 U.S. 563 (1974), this Court upheld claims made under the Civil Rights Act of

---

Survey, tbl.227 (2006), *available at* http://www.census.gov/compendia/statab/tables/09s0227.pdf.

[6] *Id.*

1964 by Chinese-American students with limited English proficiency who were being denied access to educational opportunities:

> [T]here is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education ... [b]asic English skills are at the very core of what public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those basic skills is to make a mockery of public education.

Id. at 566. This Court recognized in *Lau* that a student's primary language is so closely related to his or her national origin that language-based discrimination is effectively a proxy for national origin discrimination. *Id.* at 568.

In the same year as the *Lau* decision, Congress enacted the Equal Educational Opportunities Act of 1974. The EEOA prohibits discrimination against students, faculty and staff in public schools and requires that state governments take action to overcome barriers to students' equal participation in public schools. At issue in this case is section 1703(f) of the EEOA, which prohibits States from denying "equal educational opportunity to an individual on account of his or her race, color, sex or national origin by ... the failure [of] an educational agency to take appropriate action to overcome language barriers that impede equal participation by its

students in its instructional programs." 20 U.S.C. § 1703.

Since its passage, the EEOA has been instrumental in improving educational opportunities for students who are not native English speakers. However, while the EEOA requires states to take appropriate action to overcome language barriers, states do not always do so of their own accord.

2. There Is Still A Wide Achievement Gap Between ELL Students And Native English Speakers.

Notwithstanding passage of the EEOA, an achievement gap remains between ELL students and their native-English-speaking peers.

a. Providing Educational Opportunities To ELL Students Is A National Issue Not Limited To A Few States.

While the populations of five states (Arizona, California, Florida, New York and Texas) accounted for about 70 percent of the nation's ELL students in the 2003-04 school year, ELL population growth varies dramatically by state.[7] States with a recent influx of immigrants are experiencing much higher increases in their ELL student population than states that have heretofore had large ELL student populations. For example, ELL enrollment between 1995 and 2005 increased 26 percent in California, a state with a long history of receiving immigrants;

---

[7] Richard Fry, *Explaining the English Language Learner Achievement Gap*, Pew Research Center (June 26, 2008), *available at* http://pewresearch.org/pubs/882/english-language-learner.

ELL enrollment during the same period expanded by 372 percent in North Carolina, a state only recently experiencing sharp gains in its immigrant population.[8]

b. Native English Speakers Continue To Outscore ELL Students On Tests.

Assessment data from the states with the highest populations of ELL students uniformly indicate that ELL students are much less likely than other students to score at or above proficient levels in mathematics, reading, and language arts.[9]

Advancements in ELL educational programs have done little to close the achievement gap between ELL students and native English-speaking students. In many subjects, this gap continues to grow. The Stanford Achievement Test, 9th Edition (the "Stanford 9"), provides for the assessment of students in grades two through eleven every year in reading, math and language (as well as other subjects at targeted grade levels). In 1998, the national percentile rank of the average ELL student score on the Stanford 9 reading and language tests was consistently 20 or more points lower than the overall student body and 16 points lower in math and spelling.[10] In social sciences, which is assessed in

---

[8] Jeanne Batalova, Michael Fix, Julie Murray, *Measures of Change: The Demography and Literacy of Adolescent English Learners*, Carnegie Corporation of New York, at 12 (2007). *available at* http://www.migrationpolicy.org/pubs/Measures_of_Change.pdf

[9] Fry, *supra* note 7.

[10] While reading, language and math skills are tested in grades 2-11, Spelling is only assessed in grades 2-8.

grades nine through eleven, the average discrepancy was 21.2 points.[11]

The average achievement gap between ELL students and all students increased notably between 1998 and 2002. The Stanford 9 results over this five year period show that the gaps in reading, math and language scores between ELL students and the overall student body from grades 6-8 increased by 7.33, 8.33, and 5.67 percentage points respectively. Older students followed a different trend.

Nationwide, only 30 percent of fourth-grade ELL students are "at or above basic" in reading, compared to 71 percent of native English speakers.[12] The gap is slightly larger among eighth-graders. Similar double-digit gaps are prevalent in math, though slightly smaller among students in grade four.[13] The gaps remain relatively unchanged among high school students where achievement levels decrease over the entire student body.[14]

---

[11] *See* William Myhill, *The State of Public Education and the Needs of English Language Learners in the Era of "No Child Left Behind,"* 8 J. Gender Race & Just. 393, 435-436 (2004).

[12] Mellissa Lazarin, *A Race Against the Clock: The Value of Expanded Learning Time for English Language Learners*, Center For American Progress, at 3 (Dec. 2008) *available at* http://www.americanprogress.org/issues/2008/12/pdf/ell.pdf.(citing NATIONAL CENTER FOR EDUCATION STATISTICS, *The Nation's Report Card: Reading 2007*, NCES 2007-496 (U.S. Department of Education, 2007)).

[13] *Id.* (citing NATIONAL CENTER FOR EDUCATION STATISTICS, *The Nation's Report Card: Mathematics 2007*, NCES 2007-494 (U.S. Department of Education, 2007)).

[14] *Id.* (citing NATIONAL CENTER FOR EDUCATION STATISTICS, "The Nation's Report Card: 12th-Grade Reading and

Similar results are found in the 2006 report on the No Child Left Behind Act ("NCLB"), conducted by the United States Government Accountability Office, which found that students with limited English proficiency were generally lagging behind the general student population in academic proficiency.[15] On average, only about 1 in every 3 ELL students in grades 4, 8 and 12 performed at or above the "basic" level on the National Assessment for Education Progress in reading, while nearly 3 out 4 non-ELL students in those grades performed at or above the "basic" level.[16]

The large academic gap between ELL students and native English speakers indicates that there is a clear need to implement effective instructional strategies for ELL students.

c. Effective ELL Programs Increase The Number Of High School Graduates.

Low test scores are not the only evidence of the negative impact of ineffective English language instruction. States with large ELL student populations report dismal results in high school graduation rates for ELL students. In California, for instance, 20 percent fewer ELL students passed the mandatory exit exam required to obtain a high school

---

Mathematics 2005," NCES 2007-468 (U.S. Department of Education, 2007)).

[15] UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, "No Child Left Behind Act: Assistance from Education Could Help States Better Measure Progress of Students with Limited English Proficiency," GAO-06-815, at 13 (July 26, 2006), *available at* http://www.gao.gov/new.items/d06815.pdf.

[16] Lazarin, *supra* note 12, at 4.

diploma than the overall student body.[17] New York reports even worse results: Only 25-30 percent of ELL students in New York graduate within four years of entering high school, compared to 71 percent of native English speakers.[18]

While these numbers paint a bleak picture, it is important to recognize that where English language instruction is effective, clear gains have been demonstrated. New York found that where its school districts permitted an additional one to two years of schooling, graduation rates for ELL students jumped to 38-44 percent. Perhaps the most salient data in support of effective English instruction is that students who have attained English language proficiency and exited out of the limited-English proficient category have even higher graduation rates than their native English speaking peers (74 percent).[19]

3. Effective ELL Programs Address The Needs Of The Changing Population of U.S. Schools.

The growing achievement gap for ELL students, and the failure of inadequate ELL education programs to close the gap are of particular concern

---

[17] California Department of Education News Release #08-117, Sept. 9, 2008, tbl.1, *available at* http://www.cde.ca.gov/nr/ne/yr08/yr08rel117.asp#tab1.

[18] NEW YORK STATE BOARD OF REGENTS, *Graduation Rates: Students Who Started 9th Grade in 2001, 2002 and 2003 and 2006-07 Regents Examination Results*, (Aug. 11, 2008), *available at* http://www.oms.nysed.gov/press/documents/Gradrates06-07FINAL.ppt.

[19] *See id.*

given the rapid growth of ELL students in U.S. public schools. According to the National Clearinghouse for English Language Instruction & Language Educational Programs (the "NCELA"), the total kindergarten through 12th grade (K-12) enrollment in the United States grew less than 4 percent from the 1995-1996 school year to the 2005-2006 school year. In contrast, enrollment of students with limited English proficiency increased by over 57 percent during the same time period.[20] With the ELL student population expanding every year, it is essential that public school systems include effective ELL programs.

Providing adequate ELL programs is not only needed for first-generation immigrants in the United States. Up to 27 percent of all ELL adolescents are second generation, and 30 percent are third generation, meaning that many students educated exclusively in U.S. schools (and whose parents were educated exclusively in U.S. schools) still cannot speak English well.[21] These statistics demonstrate that poorly managed and underfunded ELL programs have failed students across multiple generations.

If states are not held to the standards for equal opportunity for ELL students the EEOA requires, the achievement gap will continue to widen as the ELL population continues to grow. Such an increase in inequality is precisely what the EEOA was enacted to prevent.

---

[20] NCELA, *supra* note 2.

[21] Batalova, Fix, Murray, *supra* note 8, at 13.

B. EFFECTIVE ENGLISH LANGUAGE LEARNER PROGRAMS THAT FOCUS ON ENGLISH PROFICIENCY FOR STUDENTS ARE CRITICAL FOR SUCCESSFUL IMMIGRANT INTEGRATION.

For immigrants in the United States, proficiency in the English language is a necessary condition for naturalization, effective participation in civic engagement activities, economic self-sufficiency, and successful integration in society. A key component of implementing and effectuating English language learning and integration is dedicating resources and efforts to improving educational opportunities and programs for ELL students. Effective ELL programs that focus on helping students develop English language proficiency, as well as the necessary academic skills in other subjects that are taught in English, are critical for helping ELL students and their families become more active, productive and integrated in society.

1. English Proficiency Is Critical To Social, Economic And Familial Integration.

As the fastest growing segment of the student population in the United States,[22] the five million-plus limited English proficient students in the United States[23] increasingly require effective ELL programs in place, to provide ELL students with opportunities to develop both English language proficiency and other academic skills. Students who develop English language proficiency as children will have greater opportunities when adults to

---

[22] Batalova, Fix, Murray, *supra* note 8, at 12.

[23] NCELA, *supra* note 2.

participate fully in civic engagement activities, make meaningful contributions to the broader local community, and become fully-integrated, productive members of society. The high correlation between limited English proficiency and poverty rates within immigrant communities indicates that improved English skills benefit the individual as well as his or her community and the nation as a whole.[24]

Developing effective English language skills provide ELL students the opportunity to increase their future earning potential and achieve economic self-sufficiency and stability. Further, ELL students who acquire English language skills will be better able to assist their non-English speaking family members in adapting to life in the United States and integrating into the broader society.[25] All of these potential benefits are dependent on effective ELL programs.

2. Learning English Is Most Effective When Children Are Taught As Early As Possible.

Children who fail to receive an adequate education in English are unlikely to have a second opportunity to learn English as adults. Depending on their background, their prior formal educational experiences and a host of other factors, it can take years for ELL students to develop English language

---

[24] Batalova, Fix, Murray, *supra* note 8, at 31.

[25] Hoyt Bleakley and Aimee Chin, *What Holds Back the Second Generation? The Intergenerational Transmission of Language Human Capital Among Immigrants*, The Center for Comparative Immigration Studies, University of California, San Diego, at 2 (Oct. 2004), *available at* http://www.ccis-ucsd.org/PUBLICATIONS/wrkg104.pdf.

proficiency. Acquiring the competency in academic English necessary for ELL students to perform at the same academic level as their non-ELL peers takes between four and seven years.[26] Thus it is important that ELL programs focus on developing an ELL student's proficiency as early and as consistently as possible. The educational experiences and developmental activities that occur during the earlier years of a child's life play a critical role in his or her overall development.[27]

The lack of widely available and effective adult ELL programs underscores the importance and benefits of effective ELL programs aimed at developing English language proficiency for school-aged children. A survey of 184 English as a Second Language ("ESL") providers found that more than half of those providers indicated that there was a waiting list for adult ESL classes ranging anywhere from a few weeks to more than three years.[28] The tremendous demand for adult ESL classes in the

---

[26] Kenji Hakuta, Yuko Goto Butler, and Daria Witt, *How Long Does it Take English Learners to Attain Proficiency?* The University of California Linguistic Minority Research Institute, at 10 (2000), *available at* *http://caselinks.education.ucsb.edu/casetrainer/CLADContent/CladLanguage/node7/theory/HowLong.pdf*

[27] *See* National Association for the Education of Young Children (NAEYC), *Screening and Assessment of Young English-Language Learners*, Supplement to the NAEYC Position Statement on Early Childhood Curriculum, Assessment, and Program Evaluation (Summer 2005), *available at* http://www.naeyc.org/about/positions/pdf/ELL_Supplement.pdf.

[28] Dr. James Thomas Tucker, *Waiting Times for Adult ESL Classes and the Impact on English Learners*, The National Association of Latino Elected and Appointed Officials Education Fund, at 13 (June 2006), *available at* http://www.naleo.org/downloads/ESLReportLoRes.pdf.

United States, coupled with the scarce supply of available ESL classes underscores the importance of developing and implementing effective programs in public schools to ensure that, by the time they become adults, ELL students will have developed the necessary English language skills and will not have to rely on adult ELL programs.

3. Effective ELL Programs Benefit Society As A Whole.

Effective English language instruction not only can provide tremendous benefit for an individual, but can have an enormous impact on society as a whole. The correlation between effective ELL instruction and the ability of a student to graduate from high school provides an excellent illustration of this point.

Without effective ELL programs, this educational gap between ELL students and English-fluent students will remain, making it difficult for ELL students to enjoy the same opportunities afforded to English-proficient students with greater academic proficiency. Effective ELL programs aimed at narrowing the educational gap between ELL student and English-fluent students can also promote greater unity and integration within a school, as the ELL students are better able to relate to their English-proficient peers and better able to assimilate and integrate into the school environment.

As the Ninth Circuit noted, an ELL student's problems extend beyond extra assistance with English. "A tenth grader, for example, who speaks no English but must pass a biology course taught entirely in English will require considerable assistance." *Flores v. Arizona,* 516 F.3d 1140, 1169

(9th Cir. 2008). Until a student is English proficient, the student will need extra assistance in all subjects.[29]

The educational gap, in turn, results in lower graduation and matriculation rates for ELL students,[30] which in turn are tied to lower future earning potential for such ELL students.[31] Viewed strictly from the standpoint of enabling an individual ELL student to improve his or her quality of life, the impact is stark: a high school diploma results, on average, in an additional $8,580 in income per year.[32]

The lifelong impact of a failed ELL education has a financial effect on a student's community, the state, and the nation as a whole. As identified *supra*,

---

[29] "It is not an easy undertaking to learn and excel in math, reading and language arts, science, and other core academic subjects that have become integral to a college and work-ready curriculum, all while learning a new language." Lazarin, *supra* note 12, at 17.

[30] *See* NEW YORK STATE BOARD OF REGENTS, *supra* note 18 (finding that only 25 to 30 percent of ELL students in New York graduate within four years of entering high school, compared to 71 percent of non-ELL students); and *see also* M.M. McMillen, P. Kaufman, & S. Klein, *Dropout rates in the United States: 1995*, Washington, DC: U.S. Department of Education, Office of Educational Research and Improvement, NCES 97-473 (1997) (finding that, in 1995, students who reported that they did not speak English well had a 32.9% dropout rate, compared to 19.2% dropout rate for students who reported speaking English well or very well).

[31] U.S. CENSUS BUREAU, *Earnings Gap Highlighted by Census Bureau Data on Educational Attainment*, (2007), *available at* http://www.census.gov/Press-Release/www/releases/archives/education/009749.html.

[32] BUREAU OF LABOR STATISTICS, *Employment Projections: Pays to Play*, (March 6, 2009), *available at* http://www.bls.gov/emp/emptab7.htm

California reports that 20 percent fewer ELL students passed the mandatory exit exam required to obtain a high school diploma, when compared to the overall student body.[33] California taxpayers lose $169,000 in additional tax revenues over the lifetime of an individual who fails to obtain a high school diploma.[34]

Further, the community at large sees a reduced burden on expenditures relating to crime, health, and welfare when more students graduate. Only 25-30 percent of ELL students in New York graduate within four years of entering high school, compared to 71 percent of native English speakers.[35] For each new ELL high school graduate, New York saves $15,993 in Medicaid and uninsured costs.[36] Viewed another way, a 5 percent increase in male high school graduates nationwide could result in crime-related savings of $4,939,017,909 *on an annual basis*, in addition to the related intangible benefits of lowering the crime rate.[37]

---

[33] California Department of Education News Release #08-117, September 9, 2008 tbl.1, *available at* http://www.cde.ca.gov/nr/ne/yr08/yr08rel117.asp#tab1.

[34] Clive R. Belfield and Henry M. Levin, *The Return on Investment for Improving California's High School Graduation Rate*, California Dropout Research Project, at 2 (Aug. 2007) (affiliated project of University of California Linguistic Minority Research Institute), *available at* http://www.cbcse.org/media/download_gallery/California%20Dropout%20Study%20Report%202FINAL.pdf.

[35] NEW YORK STATE BOARD OF REGENTS, *supra* note 18.

[36] Jason Amos, *Dropouts, Diplomas, and Dollars: U.S. High Schools and the Nation's Economy*, Alliance for Excellent Education, at 39 app.3 (August 2008), *available at* http://www.all4ed.org/files/Econ2008.pdf.

[37] *Id.* at 38 app.2.

While an individual ELL student's right to an equal education should be reason enough to implement and maintain effective English instruction, it is important to recognize that a failure to provide appropriate English instruction has serious social and economic costs as well.

C. THE COURT SHOULD NOT CONSIDER COMPLIANCE WITH THE NCLB EQUIVALENT TO COMPLIANCE WITH THE EEOA.

Petitioners argue that the NCLB's statutory scheme supplements the purpose of the EEOA and defines the EEOA's "appropriate action" requirement, such that compliance with the NCLB equates to compliance with the EEOA. Although both the EEOA and the NCLB attempt to advance the achievement of ELL students, the two statutes seek advancement by entirely different means that cannot be interpreted coterminously. Many of these reasons are discussed in Respondents' briefs. However, an area of particular importance to *amici* is the EEOA's private right of action, which permits an individual citizen to bring suit in order to enforce the rights ensured by the EEOA. The NCLB contains no such express right, nor should this testing-based law be burdened with the additional obligation of protecting the civil rights of ELL students.

The EEOA, in part, ensures that ELL students have equal access to education by allowing individual students to bring private causes of action for any violation of the Act. Section 1706 of the EEOA states that "an individual denied an equal educational opportunity...may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be

appropriate." 20 U.S.C. § 1706. Since the enactment of the EEOA, ELL students have used this private cause of action under the statute to guarantee equal access to education in order to overcome language barriers. *See e.g. Gomez v. Illinois State Bd. of Education,* 811 F.2d 1030 (7th Cir. 1987); *Morales v. Shannon,* 516 F.2d 411 (5th Cir. 1975).

Specifically, an ELL student may bring suit against an educational agency that fails "to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. § 1703(f). Conversely, the NCLB does not appear to offer such method of enforcing individuals' rights. "The No Child Left Behind Act does not create a private right of action." *Alliance for Children v. City of Detroit Public Schools,* 475 F.Supp.2d 655, 657 (E.D. Mich. 2007). "The NCLB[] provides no procedure for individual entities [] to enforce its requirements: the Act's only 'penalties' provision allows the Secretary of Education to withhold funds from states that do not meet the Act's requirements." *Fresh Start Academy v. Toledo Board of Education,* 363 F.Supp.2d. 910, 914 (N.D. Ohio 2005).[38]

---

[38] Petitioner Superintendent states that the NCLB permits individual students to file an administrative complaint if their programs are inadequate, which complaint ultimately could be resolved by the Department of Education. Brief for the Petitioner Superintendent at n.23. However, the NCLB itself provides no specific procedures for the resolution of complaints, leaving that up to the individual states to implement. 20 USCS § 7844 (each state will "adopt and use proper methods of administering each such program, including ... the adoption of written procedures for the receipt and resolution of complaints alleging violations of law in the administration of the programs"). Thus, the procedures, rights and remedies

Further comparisons between the NCLB and the EEOA confirm the insufficiency of the NCLB to address the issues contemplated by and addressed in the EEOA to protect the important educational rights of each student.[39] First, and perhaps most significantly, states and school districts *are not required to comply with the NCLB.* Individual states or school districts may choose to opt out. See 20 U.S.C. § 7907(a) ("[n]othing in this Act shall be construed to authorize an officer or employee of the Federal Government to . . . mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act"). If the EEOA is overridden and its private right of action eliminated, students in states that have opted out of the NCLB (or may do so in the future) will have no recourse against a discriminatory school system.

Further, technical aspects of the NCLB can adversely affect ELL students. The NCLB designates four groups of students for particular focus, one of which comprises students who are

---

available to a student to rectify an inadequate ELL program could vary significantly from state to state and cannot be considered equivalent to the private right of action under the EEOA.

[39] Petitioners Speaker of the Arizona House of Representatives and President of the Arizona Senate assert that they are not arguing for the implicit repeal of the EEOA. Brief for Petitioners at 60. However, if the Court accepts that a school district meeting NCLB-standards is *de facto* complying with the EEOA, the outcome for underserved ELL students in that district is an implied repeal of the EEOA's private right of action. Petitioners admit as much, stating that the EEOA will be limited to providing protection "particular schools or school districts engag[ing] in *individual* instances of discrimination". Brief for Petitioners at 60. Petitioners' argument severely curtails the purpose of the EEOA.

limited in English proficiency. However, ELL students are only considered to be an "accountability group" if a "minimum group number" of ELL students attend a school district where the NCLB has been adopted.[40] That minimum group number is determined at the school district's discretion. Thus, if the school district's group number for ELL students is 50, but only 49 ELL students attend that school, NCLB provides no accountability for language access to those 49 children. If the NCLB were construed to supersede the EEOA, ELL students could face an untenable circumstance where they are not receiving adequate English language instruction, and yet have no ability to require their school district to improve (or even offer) such instruction. Perversely, because such a district would not be accountable for language access provided to the students who fall outside of the accountability group, the school district would have no incentive under the NCLB to offer such programs.

Another example comes from the methods by which Petitioners contend Arizona's compliance can now be assessed: mandatory testing pursuant to the NCLB's requirements. While the NCLB permits states to offer native language assessments or alternative assessments for testing ELL students to capture better a student's grasp of content, Arizona declines to offer either accommodation.[41]

---

[40] U.S. DEPARTMENT OF EDUCATION, *Fact Sheet: NCLB Provisions Ensure Flexibility and Accountability for Limited English Proficient Students*, (last modified Feb. 19, 2004), *available at* http://www.ed.gov/nclb/accountability/schools/factsheet-english.html.

[41] UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 15, at 33-34.

Appropriate testing and assessment of ELL students has been controversial, and the alternatives offered under the NCLB are adopted inconsistently among the participating states, thus making data concerning the progress of ELL students impossible to compare. It appears likely that such issues will continue to arise. The Government Accountability Office's July 2006 Report, "No Child Left Behind Act: Assistance from Education Could Help States Better Measure Progress of Students with Limited English Proficiency," reports that

> [The Department of] Education has issued little written guidance on how states are expected to assess and track the English proficiency of [limited English proficient] students, leaving state officials unclear about Education's expectations ... [M]any of the state and district officials we interviewed told us that the current flexibilities do not fully account for some characteristics of certain students in this student group ... .[42]

Further, there is conflict among state officials over how ELL students should be tested going forward. Some state officials seek longer exemptions from testing for ELL students, while others think that ELL students should be excluded from testing altogether until they demonstrate appropriate English skills.[43] If the Department of Education were to permit such accommodations (and they may; the purpose of the GAO's report was to suggest to the Department of Education that further accommodation may be warranted), the NCLB-

---

[42] *Id.* at 41.

[43] *Id.* at 48.

related testing that Petitioners assure the Court will satisfy the requirements of the EEOA may disappear altogether for ELL students.

Finally, under the NCLB, states are permitted to establish their own academic content, develop their own tests to measure performance, and set standards for what constitutes proficiency.[44] The process is completely insular, with minimal oversight or consequence unless a state's students fail to meet those standards. Consequently, a state whose students are meeting the criteria established by that state satisfies the requirements set forth by the NCLB. However, if that state were nonetheless failing to take appropriate action to overcome language barriers, the affected students would have no ability to rectify their situation, as the NCLB contains no private right of action.

Because the fundamental purpose of the EEOA is different from the NCLB, compliance with the NCLB alone cannot constitute compliance with the EEOA. The NCLB determines compliance by measuring student performance as a whole. The essence of the EEOA's private right of action is to ensure that each *individual* student receives equal educational opportunities, independent of the individual's group affiliation. That right should not be abrogated. Had Congress intended to overturn the EEOA, it could have easily said so, but it did not. Instead, the NCLB explicitly provides that "[n]othing in this part shall be construed in a manner inconsistent with any Federal law guaranteeing a civil right." 20 U.S.C. § 6847. The EEOA guarantees civil rights to individual students. Having those rights depend

---

[44] *Id.* at 9.

upon compliance with a gradual performance statute like the NCLB is inconsistent with the purpose of the EEOA. The EEOA and the NCLB both serve very important purposes in advancing ELL instruction in the United States. However, it is important that those purposes remain distinct.

D. AMICI IN SUPPORT OF PETITIONER IMPROPERLY SEEK TO REFRAME THIS CASE INTO A DEBATE ABOUT EDUCATIONAL THEORY.

In their briefs in support of Petitioners, *amici* improperly seek to politicize the issues before this Court by debating the effectiveness of bilingual education as compared to other theories of teaching English to non-native speakers. The merits of bilingual education (as opposed to an English-immersion style of teaching, currently required by law in Arizona) are not at issue here. The only salient consideration is whether the method adopted by the state provides ELL students with an adequate education under the EEOA.

The Ninth Circuit did not require that any particular theory of English education be imposed on the Nogales school district. Indeed, the school district is required only to employ an effective means of English instruction. The Ninth Circuit recognized that:

> Shortly after the injunction [ordering Arizona to prepare a cost study to establish the proper appropriation to implement ELL programs], in November 2000, Arizona voters approved two propositions that altered Arizona's school funding and ELL programs. Proposition 203 largely abolished bilingual

> education, replacing it with sheltered English immersion ... Proposition 301 increased school funding generally in Arizona through a sales tax increase.

Flores at 1149. Further, the Ninth Circuit focused its analysis of "changed facts" on policy changes implemented by the "successful management" of Kelt Cooper and his successor, Dr. Guilermo Zamudio, and resultant testing scores, funding issues, and conditions in comparable districts. The Ninth Circuit did not base its analysis in any way on the possible merits of a bilingual education, nor did it criticize Arizona's current policy of English-immersion education, simply stating that while "Arizona's theory of ELL instruction has changed over the years, the enormous importance of such programs to students and parents in Nogales has not." *Flores* at 1145.[45] The Ninth Circuit's holding does not rely in any way upon an evaluation of the *method* of providing English language instruction to its students, because neither petitioner nor respondent focused the Court on the issue. Rather, the Court's focus was (appropriately) on whether ELL programming funds are sufficient (as that was

---

[45] This is not to say that the Ninth Circuit did not recognize that there had been a policy shift following the passage of Proposition 203: "[A]fter 2000, when Arizona moved away from bilingual education and required most courses to be taught in English, regardless of students' language abilities, these challenges have become greater: A tenth grader, for example, who speaks no English but must pass a biology course taught entirely in English will require considerable assistance." *Flores* at 1169. The Ninth Circuit does not criticize English immersion educational theories, but rather makes a valid point about the resources required for effectively transforming theory into reality.

the method of compliance originally adopted by the state). The Ninth Circuit did not review the way in which ELL students were being educated, leaving that up to the state's discretion. Rather, the Court reviewed whether or not there had been a change of fact that might relieve Arizona from the final judgment.

Thus, it is clear that *amici* are mistaken when they state that the Ninth Circuit erred as a result of its alleged "failure to understand the evolution in methods for teaching English Language Learners,"[46] and by "substituting its own preference for educating Arizona's students for the validly enacted policy of the people of Arizona."[47] *Amici* The Eagle Forum's conclusory statement that "prior federal statutory acceptance of English immersion would support the appropriateness of Arizona's academic success"[48] is not supported. Rather, these attempts to inflame passions over immigration or English-only policies are a disservice to Arizona's ELL students. Arizona has failed to take appropriate action to overcome language barriers that impede equal participation by its students in educational programs. This is a violation of the EEOA, regardless of whether the failure occurs in the process of teaching ELL students via an English-immersion program or through bilingual education. The Court should not

---

[46] Brief of the American United Legal Defense Fund, English Language Political Action Committee, ProEnglish and the Center for Opportunity, as *Amici Curiae* Supporting Petitioners, at 2.

[47] Brief Amicus Curiae of Pacific Legal Foundation and Evergreen Freedom Foundation in Support of Petitioners, at 3.

[48] Brief *Amicus Curiae* of Eagle Forum Education & Legal Defense Fund, Inc., In Support of Petitioners, at 5-6.

consider these incendiary proclamations by *amici* for Petitioners, which do not bear on the issues here.

Finally, alarmist stories of disaster resulting from mistranslations of English phrases[49] do not inform the issue before the Court, unless it is to emphasize the importance of adequate programs for ELL students. To the extent they are relevant at all, *amici*'s examples highlight the tragic results of inadequate English language instruction. It is indeed ironic for these examples to be cited as examples for why Arizona should be permitted to continue flaunting the federal judgment in place against it by continuing to underfund ELL programs.

---

[49] Brief *Amicus Curiae* of Eagle Forum Education & Legal Defense Fund, Inc., In Support of Petitioners, at 17-18 n.3.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

KAREN K. NARASAKI VINCENT A. ENG MEREDITH S.H. HIGASHI ASIAN AMERICAN JUSTICE CENTER 1140 Connecticut Ave., NW Suite 1200 Washington, DC 20036 (202) 296-2300	ALAN GILBERT *Counsel of Record* RICHARD ZUCKERMAN KATHERINE EVANS* CHRISTOPHER LEE** JONATHAN CHOCK* SONNENSCHEIN NATH & ROSENTHAL LLP 7800 Sears Tower 233 South Wacker Dr. Chicago, IL 60606-6404 (312) 876-8000 * *Admitted only in California* ** *Admitted only in Arizona*

Attorneys for Amici Curiae

APPENDIX

APPENDIX A

List Of *Amici Curiae*

Asian American Institute (AAI)
AAI is a pan-Asian, non-partisan, not-for-profit organization located in Chicago, Illinois, whose mission is to empower the Asian American community through advocacy, by utilizing coalition building, education, and research. AAI's programs include community organizing, leadership development, and legal advocacy. Asian Americans are a diverse and often overlooked community, but they are one of the fastest-growing populations in the United States. In today's diverse society, it is crucial to eradicate language access barriers faced by the Asian American community at health care institutions, polls, and schools. Because AAI recognizes the importance of effectively educating English Language Learners, AAI has a strong interest in the outcome of this case.

Asian Law Caucus (ALC)
Founded in 1972, ALC is a non-profit organization advancing the legal and civil rights of Asian American and Pacific Islander communities. It is the nation's oldest legal organization serving Asian Americans and is dedicated to the pursuit of equality and justice for all sectors of society. We advocate for equal access to all public services regardless of English language ability and focus on the needs of Asian immigrants in particular.

Asian Pacific American Legal Center of Southern California (APALC)

APALC was founded in 1983 and is the nation's largest non-profit public interest law firm devoted to the Asian Pacific American community. Serving 15,000 individuals and organizations each year, APALC has expertise in workers' rights, anti-discrimination, immigrant welfare, immigration and citizenship, voting rights, and hate crimes. APALC represents and advocates for limited English proficient individuals through public advocacy, community education, and litigation to ensure adequate language services to immigrants.

Asian Pacific American Legal Resource Center (APALRC)

APALRC is the Capital Region's non-profit advocate advancing the legal and civil rights of Asian Pacific Americans through direct services, education, and advocacy. The APALRC addresses the individual legal needs of low-income and limited English proficient Asian Pacific Americans and advocates for broad-based systemic change on legal and civil rights issues impacting Asian Pacific Americans. The APALRC joins *amici* seeking to ensure equal and meaningful access to education for limited English proficient individuals.

Boat People SOS (BPSOS)

BPSOS is a national immigrant services organization serving primarily Vietnamese refugees and immigrants with 13 branch offices nationwide. BPSOS' domestic operation includes a large array of human and immigration services for Vietnamese refugees and immigrants. Upon immigrating to the United States, most older Vietnamese have limited English proficiency, if any. The children of these immigrants need the additional assistance in the

American educational system to learn the language and to assimilate into American culture and take full advantage of the opportunities this country has to offer. It is because of this interest BPSOS participates in the brief.

California Rural Legal Assistance Foundation (CRLAF)

CRLAF is a non-profit legal services organization representing farm workers and other low income immigrant families in rural California. The majority of CRLAF clients are not English speakers and are representative of the diversity of farm workers in California, speaking not only Spanish, but a variety of indigenous languages. For over 30 years CRLAF has advocated for the rights of English learners in California schools through legislative advocacy and has represented farm worker families in actions brought under the EEOA and in writ proceedings seeking to compel state and local officials to comply with the independent mandates of the NCLB.

Child Care Law Center (CCLC)

CCLC is a public interest, non-profit law firm that uses legal tools to make high quality, affordable early childhood education available to every child, family and community. As a legal services support center, CCLC focuses particular attention on families who face barriers in securing and maintaining quality early childhood education: low-income families, limited English proficient parents and their English Language Learner children, families and children with disabilities and special health care needs, and other vulnerable families. CCLC directly serves clients who are affected by a lack of access to English language learning in early education

settings and provides technical assistance to legal services programs throughout the state of California working on issues of access and support for young English Language Learners. CCLC joins this amicus brief to help ensure English Language Learner and limited English proficient children have meaningful access to education.

Coalition of California Welfare Rights Organizations (CCWRO)

CCWRO is a private, non-profit organization established in 1982 as a statewide public interest non-profit law firm which specializes in poverty law, including civil rights law, and advocates on behalf of limited English proficient individuals in California to ensure that they have meaningful access to government programs, services, and benefits as required by Title VI of the Civil Rights Act of 1964. This is vital for refugees and limited English-speaking persons to become self-sufficient and end reliance on public benefits.

Empire Justice Center

The Empire Justice Center is a statewide public interest non-profit law firm which specializes in civil rights law and advocates on behalf of limited English proficient individuals in New York to ensure that they have meaningful access to government programs, services, and benefits as required by Title VI of the Civil Rights Act of 1964. The Empire Justice Center is a member of the National Language Access Advocates Network (N-LAAN), a national organization that supports and engages in effective advocacy to eradicate discrimination based on language.

Isabel Framer

Isabel Framer is CEO of Language Access Consultants, LLC in Copley, Ohio. Ms. Framer is a national expert on language access, an Oregon and Tennessee-certified judiciary interpreter, author, and Chair of the National Association of Judiciary Interpreters and Translators. She has served on the Interpreter Services Subcommittee of the Supreme Court of Ohio's Racial Fairness Implementation Task Force and on the Board of the Racial Fairness Project in Cleveland, Ohio. Through consulting and policy work, particularly with regard to court, law enforcement, domestic violence and other legal and quasi-legal settings, Ms. Framer seeks to improve language access for Limited English Proficient communities. She joins this amicus brief because the effective education of English Language Learners has broad implications for their full and equal access to justice.

The Fred T. Korematsu Center for Law and Equality (Korematsu Center)

The Korematsu Center is a non-profit organization based at Seattle University School of Law and works to advance justice through research, advocacy, and education. The Korematsu Center is dedicated to advancing the legacy of Fred Korematsu, who defied the military orders during World War II that ultimately led to the internment of 110,000 Japanese Americans. He took his challenge of the military orders to the United States Supreme Court, which upheld his conviction in 1944 on the ground that the removal of Japanese Americans was justified by "military necessity." Fred Korematsu went on to successfully challenge his conviction and to champion the cause of civil liberties and civil rights

for all people. The Korematsu Center, inspired by his example, works to advance his legacy by promoting social justice for all. It has a special interest in safeguarding language rights to ensure educational and economic opportunities so that everyone can participate fully in our nation's democratic traditions. We note that the Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

Hmong National Development, Inc. (HND)
HND is a national, non-profit organization developing capacity to ensure the full participation of Hmong in society. HND works with local and national organizations, public and private entities, and individuals to promote educational opportunities, to increase community capacity, and to develop resources for the well-being, growth, and full participation of Hmong in society. Historically, we have provided advocacy on behalf of Hmong refugees who face barriers to opportunities in society due to lack of resources and language abilities.

Japanese American Citizens League (JACL)
The JACL, founded in 1929, is the nation's oldest and largest Asian American non-profit, non-partisan civil rights organization with 113 chapters throughout the continental United States, Hawai'i, and Japan. It consistently strives to uphold the civil and human rights of Americans of Japanese Ancestry and of all people. The JACL has held a prominent role in obtaining redress for Japanese Americans who were interned during World War II. Currently it works to educate against and combat discrimination on the basis of race, national origin, age, ethnicity, gender, or disability, and to protect

the right of all persons to equal participation in educational programs. Since *Brown v. Board of Education,* the JACL has maintained a strong position in protecting civil rights and protecting equal educational opportunities. *Amici* thus has an important and substantial interest in this case.

Legal Aid Association of California (LAAC)
LAAC is a statewide membership association of over 80 non-profit public interest law organizations, which provide free civil legal services to low-income persons and communities throughout California, and over 90 individual staff members and supporters of such programs. The mission of LAAC (which is itself a non-profit corporation) is to ensure the efficient and coordinated delivery of legal services to indigent and disadvantaged persons throughout California, and to provide an effective and unified voice for its members on issues of concern to the statewide justice community. LAAC member organizations provide legal assistance on a broad array of substantive issues, ranging from general poverty law to civil rights to immigration, and also serve a wide range of poor, disadvantaged, and vulnerable populations. Many of LAAC's organizational members serve clients who are affected by a lack of access to English language learning. LAAC supports the goals and missions of N-LAAN.

National Korean American Service & Education Consortium (NAKASEC)
NAKASEC is a national non-profit organization based in Los Angeles with a Washington, D.C. office. NAKASEC's affiliates are the Korean American Resource & Cultural Center in Chicago and the Korean Resource Center in Los Angeles. Founded in

1994, NAKASEC is a multi-issue civil rights and human rights organization based in the Korean American community. NAKASEC's mission is to project a national progressive voice for Koreans Americans and promote their full participation in the United States. To this end, NAKASEC promotes equitable and just changes to the political and legislative systems through a combination of education and policy advocacy with grassroots organizing and community mobilization.

Organization of Chinese Americans, Inc. (OCA)
OCA is a 501(c)(3) national non-profit, non-partisan organization dedicated to advancing the social, political, and economic well-being of Asian Pacific Americans in the United States. With over 80 chapters and affiliates across the nation, OCA's aims are to advocate for social justice, to promote civic participation, to advance coalitions and community building, and to foster cultural heritage. OCA monitors issues and policies that affect the Asian Pacific American community. To ensure the progress of all members of this diverse community, OCA champions programs that support the inclusion and integration of those with educational and language needs.

Sikh American Legal Defense and Education Fund (SALDEF)
SALDEF is the oldest Sikh American civil rights and advocacy organization in the United States. Founded as the Sikh Mediawatch and Resource Task Force (SMART) in 1996, SALDEF empowers Sikh Americans through legal assistance, educational outreach, legislative advocacy, and media relations. SALDEF's work with other Sikh and minority

organizations includes extensive experience providing advocacy and community education on immigration issues. SALDEF has a strong interest in advancing opportunities for Sikh Americans by eliminating language barriers.

South Asian Americans Leading Together (SAALT)
SAALT is a national non-profit organization whose mission is to promote the full and equal civic and political participation of South Asians in the United States. More than 2.7 million South Asians reside in the United States, many of whom speak limited English and confront linguistic barriers in obtaining basic services and benefits. SAALT joins this *amicus* brief to help ensure that resources are provided to English Language Learner and limited English proficient students in order to obtain meaningful access to education.

Southeast Asia Resource Action Center (SEARAC)
SEARAC is a national non-profit organization advancing the interests of Southeast Asian Americans through leadership development, capacity building and community empowerment. Established in 1979 to assist with the resettlement of the largest group of refugees to the United States from Southeast Asia, SEARAC continues to be a leading advocate for these communities. SEARAC has been a strong advocate on student rights, particularly for English language learners and their access to high quality instruction and educational services. Through our work on K-12 education issues with congressional and federal policy makers and with Southeast Asian American families who are directly affected, we recognize the unfair and harmful impact our current education policies have on our

communities across the United States. As such, we support AAJC in its submission of this brief to highlight the consequences of inadequate resources for the instruction of non-native English-speaking students and their families.

The Watsonville Law Center (WLC)

WLC is a private, non-profit, legal services organization established in 2002 to provide low-income individuals equal access to the law by assisting them to understand, exercise and enforce their rights. WLC serves a primarily monolingual Spanish-speaking farmworker community in an agricultural region. WLC addresses legal barriers faced by immigrant and other low-income individuals as they strive to access health and financial sustainability. English language proficiency increases access to justice, strengthens low-income families and improves their economic prospects over time. WLC joins this *amici* brief to help ensure the thousands of children in our community who are English language learners have the resources and opportunities necessary to obtain a meaningful education for a prosperous future.

AMICUS CURIAE BRIEF

Nos. 08-289 & 08-294

IN THE

Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF ARIZONA, and SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES, *ET AL.*,

Petitioners,

v.

MIRIAM FLORES, *ET AL.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE ASIAN AMERICAN LEGAL DEFENSE & EDUCATION FUND, *ET AL.* AS AMICI CURIAE SUPPORTING RESPONDENTS

Kenneth Kimerling
Khin Mai Aung
Cecilia Chen
Asian American Legal Defense & Education Fund
99 Hudson Street 12/F
New York, NY 10013-2815
(212) 966-5932

Robert A. Long, Jr.
Counsel of Record
Stanley Young
Deanna L. Kwong
Geoffrey T. Painter
Erin R. Archerd
Covington & Burling LLP
1201 Pennsylvania Ave. NW
Washington, DC 20004
(202) 662-6000

Counsel for Amici Curiae

MARCH 2009

Additional counsel listed on inside cover

Amy L. Barton
Paul, Weiss, Rifkind,
Wharton & Garrison LLP
1285 Avenue of the
Americas
New York, NY 10019
(212) 373-3000

Counsel for Advocates for
Children of New York

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. Asian American ELLs Face Challenges That Illuminate The Issues in This Case. 6

A. Asian American ELLs Face Challenges Common to All ELLs. 8

B. Asian American ELLs Also Face Certain Unique Challenges. 9

II. Operation Under NCLB's Limited Requirements Does Not Ensure Appropriate Action under the EEOA. 12

A. NCLB Requirements for Standards and Assessment Systems Have a Limited Focus and Do Not Address All Aspects of Education to Which the EEOA Broadly Applies 13

B. NCLB Does Not Provide a Reliable Benchmark for Measuring Whether Each Individual ELL Student is Receiving an Equal Educational Opportunity 15

1. NCLB Alone Fails to Ensure That Schools Meet Specific Needs of Discrete Populations of ELLs. 15

2. NCLB "Standards" Fail to Establish a Consistent, Universal Measure of the Appropriateness of State Education Plans Because States Set Their Own Benchmarks. 18

3. NCLB Assessments May Underestimate Educational Progress by ELLs in Some Cases and Overestimate It in Others. 23

C. EEOA Violations Have Occurred in Schools Are Operating Under NCLB. 24

1. EEOA Investigations by the DOJ Have Resulted in Consent Decrees Against and Settlements Involving Schools Operating Under NCLB. 25

2. There Also Are Documented Problems in Cases Outside the DOJ Enforcement Context. 27

D. The EEOA Protects the Rights of Individual ELL Students in Ways that NCLB Does Not. 35

CONCLUSION 39

APPENDIX 1a

TABLE OF AUTHORITIES

Page(s)

CASES

Association of Community Organizations for Reform Now v. New York City Department of Education, 269 F. Supp. 2d 338 (S.D.N.Y. 2003) 37

Castañeda v. Pickard, 648 F.2d 989 (5th Cir. 1981) 28

Doe v. Westerville City School District, No. 2:07-cv-00683, 2009 WL 29876 (S.D. Ohio Jan. 5, 2009) 37

Fresh Start Academy v. Toledo Board of Education, 363 F. Supp. 2d 910 (N.D. Ohio 2005) 37

Gomez v. Illinois State Board of Education, 811 F.2d 1030 (7th Cir. 1987) 13, 36

Gonzaga University v. Doe, 536 U.S. 273 (2002) 35

Heavy Runner v. Bremner, 522 F. Supp. 162 (D. Mont. 1981) 36, 38

Leslie v. Board of Education for Illinois School District U-46, 379 F. Supp. 2d 952 (N.D. Ill. 2005) 36

Newark Parents Association v. Newark Public Schools,
547 F.3d 199 (3d Cir. 2008) 37

Rios v. Read,
480 F. Supp. 14 (E.D.N.Y. 1978) 36

United States v. City of New York,
No. CV-04-248 (E.D.N.Y. June 29, 2004) 25, 26

United States v. Texas,
572 F. Supp. 2d 726 (2008) 36, 38

STATUTES

20 U.S.C. § 1703(f) 3, 13

20 U.S.C. § 6311(a)(1) 13

20 U.S.C. § 6311(b)(1)(C) 13

20 U.S.C. § 6311(b)(2) 13

20 U.S.C. § 6311(b)(2)(I) 21

20 U.S.C. § 6311(b)(2)(E) 19

20 U.S.C. § 6311(b)(2)(G)(i) 14

20 U.S.C. § 6311(b)(2)(H) 19

20 U.S.C. § 6311(b)(3) 13

20 U.S.C. § 6311(g)(2) 14, 35

20 U.S.C. § 6841(a)(3) 14

20 U.S.C. § 6841(b)(2)(C)(v) 14

REGULATIONS

34 C.F.R. § 200.6(b)(2) 23

34 C.F.R. § 200.6(b)(3) 23

34 C.F.R. § 200.6(b)(4) 23, 24

34 C.F.R. § 200.7(a) 20

34 C.F.R. § 200.7(b) 20

34 C.F.R. § 200.20(f)(1) 24

OTHER AUTHORITIES

Advocates for Children et al., *So Many Schools, So Few Options: How Mayor Bloomberg's Small High School Reforms Deny Full Access to English Language Learners* (Nov. 2006) 28-30

Nicole Agusti et al., Mauricio Gaston Institute for Latino Community Devolopment & Public Policy, *Identification, Program Participation and Outcomes of English Learners in Boston Public Schools, AY 2003-2006* (forthcoming April 2006) 8

APAZI Coalition, Arizona State University Asian Pacific American Studies Program & ASU for Arizona, *The State of Asian Americans & Pacific Islanders in Arizona* (2008) 7

Arizona Department of Education, Website, *School Report Cards* 21

Asian American Legal Defense & Education Fund, *Left in the Margins: Asian American Students & the No Child Left Behind Act* (2008) 6, 7, 9-11, 16-18, 38

Asian Pacific American Legal Center of Southern California, et al., *The Diverse Face of Asians and Pacific Islanders in California: Asian & Pacific Islander Demographic Profile* (2005) 8

Megan Boldt, *Report: Minnesota Schools Preparing Students for Success – Mostly. But English Learning Services Faulted,* St. Paul Pioneer Press, Jan. 6, 2009 33

Pete Bylsma et al., Washington Office of Superintendent of Public Instruction, *Educating English Language Learners in Washington State: Annual Report of the State Transitional Bilingual Instruction Program, School Year 2001-2002* (Dec. 2003) 17

Randolph Capps et al., Urban Institute, *The New Demography of America's Schools: Immigration and the No Child Left Behind Act* (Sept. 2005) 6

Coalition for Educational Excellence for English Language Learners, *Open Letter to New York Education Commissioner Richard Mills, Responding to the Systematic Crisis for English Language Learners (ELLs) in New York City,* Aug. 18, 2008 30

Commission on No Child Left Behind, *The Commission's Recommendations in Practice: What the New N-size Policy Would Mean in California* (2007) 20

Council of the Great City Schools, *Raising the Achievement of English Language Learners in the Seattle Public Schools: Report of the Strategic Support Team of the Council of Great City Schools* (2008) 31

Education Demographics Unit, California Department of Education, *Number of English Language Learners by Language, 2006-07, San Francisco* (Mar. 15, 2009) 17

Samuel G. Freedman, *English Language Learners as Pawns in the School System's Overhaul*, N.Y. Times, May 9, 2007 30

Danling Fu & J. Graff, *The Literacies of New Immigrant Youth*, in Handbook of Adolescent Literacy Research 18 (Leila Christenbury et al. eds., 2008) 11

Tiffani Helgberg, *Demand For ESL Grows AT CMS*, WCNC Local News for North Carolina, Aug. 17, 2004 33

Julie A. Hopkins et al., *Southeast Asian Refugee Youth: Implications for Juvenile Justice*, 45 Juv. & Fam. Ct. J. 15 (1994) 8

Thomas J. Kane & Douglass O. Staiger, *Unintended Consequences of Racial Subgroup Rules*, in *No Child Left Behind? The Politics and Practice of School Accountability* (Paul E. Peterson & Martin R. West eds., 2003) 19

Anneka L. Kindler, National Clearinghouse for English Language Acquisition & Language Instruction Education Programs, *Survey of the States' Limited English Proficient Students & Available Educational Programs & Services, Summary Report* (2002) 37

Meredith Kolodner, *English-Only Rise in New York City High School Graduation Rates*, Daily News, Feb. 22, 2009 31

C.N. Le, *Socioeconomic Statistics & Demographics, Asian-Nation: The Landscape of Asian America* (March 15, 2009) 9

Stacey J. Lee & Kevin K. Kumashiro, National Education Association, *A Report on the Status of Asian Americans and Pacific Islanders in Education: Beyond the "Model Minority" Stereotype* (2005) 6, 9

Kerstin Carlson Le Floch et al., U.S. Department of Education Policy & Program Studies Service, *State and Local Implementation of the No Child Left Behind Act, Volume III, Accountability Under NCLB: Interim Report* (2005) 22

Darnell Little & Azam Ahmed, *Struggling Asians Go Unnoticed, Poor Grades Lumped in with Standout Students*, Chicago Tribune, Mar. 30, 2008 38

Massachusetts Department of Education, *District and School Languages* (Mar. 2006) 18

New York City Department of Education, Website, *High School Enrollment Choices* 28

New York City Department of Education, *Progress Report 2007-08 for Pelham Preparatory Academy* 30

New York City Department of Education, Website, *Subject Areas* 33

New York City Department of Education, News & Speeches, *Mayor, Chancellor Announce the Opening of 42 New Schools in September* (Mar. 1, 2009) 29

New York City Department of Education, Office of English Language Learners, *Designing Better High Schools for ELLs: Research Summary* (Spring 2008) 29

New York City Department of Education, Office of English Language Learners, *New York City's English Language Learners: Demographics* (Summer 2008) 11

New York City Department of Education, Office of English Language Learners, *Spring 2009 Education Policy Panel Presentation* (2009) . 11, 28

Theresa Nguyen, *Asian Americans Must Enter Admissions Debate,* Yale Herald, Feb. 13, 2003 ...9

Max Niedzwiecki & T.C. Duong, Southeast Asia Resource Action Center, *Southeast Asian American Statistical Profile* (2004) 7, 10

Press Release, U.S. Department of Education, *President Bush, Secretary Paige Celebrate Approval of Every State Accountability Plan under No Child Left Behind* (June 10, 2003) 24

Patrice Relerford, *Standing Room Only Crowd Tells Mpls. School Officials: Keep Voluntary Integration Program*, Star Tribune, Mar. 6, 2009 34

Christine Rossell, *Making Uneven Strides: State Standards for Achieving English Language Proficiency Under the No Child Left Behind Act* (2005) 19

Fernanda Santos, *For Italians in Brooklyn, Voices On The Streets Have Changed,* N.Y. Times, Jan. 6, 2009 26

Ruth Schultz & Craig Vana, *Coming to America: Minneapolis's Newcomer Program* 65 Sch. Admin. 18 (2008) 16

Seattle Public Schools, *Data Profile District Summary* (Dec. 2006) 17

Seattle Public Schools, Website, *No Child Left Behind* 32

Hyon B. Shin & Rosalind Bruno, *Census Brief: Language Use and English-Speaking Ability: 2000* (2003) 10

Interview by Khin Mai Aung with Rorng Sorn, Executive Director, Cambodian Association of Greater Philadelphia, in Phildelphia, Pennsylvania (Mar. 12, 2009) 34

The Teacher-in-Chief Speaks, Economist, Mar. 14, 2009 22

Thomas B. Fordham Institute, *The Accountability Illusion* (Feb. 19, 2009) 22

Khatharya Um, Southeast Asia Resource Action Center, A Dream Denied: *Educational Experiences of Southeast Asian Youth* (2003) 10, 11

United States Census Bureau, *We the Americans: Asians* (1993) 9

United States Census Bureau, CENSR-17, *We the People: Asians in the United States* (2004) 37

United States Census Bureau, C2KBR/01-16, *The Asian Population: 2000* (2002) 37

United States Department of Education, Website, *Approved State Accountability Plans* 18, 20

United States Department of Justice, Civil Rights Division, *Civil Rights Activities and Programs* (2006 ed.) 25

United States Department of Justice, Civil Rights Division, Website, *Educational Opportunities Section Case Summaries*.....25

Wayne E. Wright & Xiaoshi Li, *Catching Up in Math: The Case of Newly-Arrived Cambodian Students in a Texas Intermediate School* 9 TABE J. 1 (Spring/Summer 2006).....15

INTEREST OF AMICI CURIAE

The Asian American Legal Defense and Education Fund ("AALDEF"), Advocates for Children of New York, Arizona Asian American Bar Association, Asian American LEAD, Asian Immigrant Women Advocates, Asian Law Alliance, Asian Pacific American Legal Resource Center, Asian Pacific Community in Action, Asian Pacific Islander Legal Outreach, Asian Pacific Islander Youth Promoting Advocacy and Leadership, Boston Chinatown Neighborhood Center, Cambodian Association of Greater Philadelphia, Center for Pan Asian Community Services, Inc., Chinese for Affirmative Action, Coalition for Asian American Children and Families, Detroit Asian Youth Project, Hmong American Partnership, Multi-Cultural Youth Project, National Korean American Service & Education Consortium, ONE Lowell, Providence Youth Student Movement, United Chinese Association of Brooklyn, Vietnamese American Young Leaders Association of New Orleans, and Washington Asian Pacific Islander Families Against Substance Abuse submit this brief as *Amici Curiae* in support of Respondents in this case.[1] All of the parties have consented to the filing of this brief.

---

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

All of the *Amici* groups are nonprofit organizations whose mission is to advocate on behalf of or provide direct services to Asian American and other immigrant communities in various jurisdictions across the United States. Additionally, many *Amici* are members of the National Asian American Education Advocates ("NAAEA") Network, a consortium of youth groups and after-school providers serving immigrant Asian American youth as well as the children of Asian immigrants. The Appendix to this brief contains additional information about the *Amici*.

The geographic areas in which *Amici* work include a broad and representative cross-section of Asian American communities throughout the United States. San Francisco and Oakland, California are home to some of the country's oldest Asian American communities, as well as to newer immigrants from across Asia. New York City, Chicago, and Washington, D.C. also are home to diverse and longstanding Asian American communities. The greater Boston area, Providence, Philadelphia, Detroit, New Orleans, Minneapolis, St. Paul, and Seattle boast significant communities of Cambodian, Laotian, Vietnamese, and Hmong refugees. Atlanta and the Phoenix metropolitan area are home to newer, rapidly expanding Asian American communities.

The educational experiences of Asian Americans across these geographic areas vary widely. Although there continues to be a common misconception that Asian Americans constitute a homogenous "model minority" group marked by an absence of barriers to educational attainment, in

reality, the Asian American population is remarkably diverse and comprises numerous ethnic groups with distinct educational experiences, histories, and needs. A closer look at the Asian American population reveals significant deficiencies in educational access and equity, often with disparities among different ethnic groups. Further, Asian American English Language Learner ("ELL")[2] students face particular challenges in public education systems that are not faced by their English-proficient peers.

Amici groups dedicate significant time and effort to the educational concerns of Asian American public school students, including the particular needs of ELLs, by advocating for proper assessment and programming in English and other content areas, access to school counseling and other services, interpretation, and translation when appropriate. In addition, several *Amici* organizations represent Asian American and other ELLs in cases of discrimination and other unlawful deprivations.

Based on these experiences, *Amici* groups are well qualified to address a key question before the Court: whether the minimum programmatic requirements in the No Child Left Behind Act of 2001 ("NCLB") guarantee that a state or local educational agency complies with the "appropriate action" requirement of Section 1703(f) of the Equal Educational Opportunities Act of 1974 ("EEOA").

---

[2] *Amici* will use the term "English language learners" or "ELLs" to refer to students whose first language is not English and who have not yet attained English proficiency.

Amici submit that the answer to this question is "no." Through their work advocating for Asian American and other ELLs across the country, *Amici* are all too aware that school districts often manage to operate under NCLB-approved plans while falling painfully short of their obligation to provide equal educational access to each and every ELL student.

SUMMARY OF ARGUMENT

The EEOA and NCLB both play important roles in the education of ELL students, but the two statutes serve distinct purposes. Enacted in 2001, NCLB is essentially a funding statute that ties federal grants to assessments of students on a collective basis in a few enumerated subject areas. NCLB provides no private right of action. In contrast, the EEOA is a civil rights statute that is broader in scope and guarantees the rights of each individual ELL to meaningful opportunities in all aspects of education. Of particular importance to ELLs is the EEOA's requirement that educational agencies take "appropriate action" to overcome language barriers that impede an ELL's access to a meaningful education.

NCLB is inherently unreliable as a measure of whether an educational agency is taking appropriate action under the EEOA to ensure equal educational opportunities for individual ELLs. The NCLB does not establish uniform, nationwide standards for school programs, but instead provides a loose framework in which states may develop their own assessments and benchmarks, which are approved by the federal Department of Education. Approved plans vary significantly from one state to another, and NCLB provides numerous ways in which a state

may exclude ELLs from its assessments and reporting. Individual ELLs can, and often do, slip between the cracks of NCLB.

In practice, it is clear that a school's operation under NCLB is no substitute for compliance with the requirements of the EEOA. In school districts that operate under NCLB, discrete ELL populations remain inadequately served. Investigations by the United States Department of Justice have resulted in consent decrees and settlements under the EEOA, even in school districts functioning under NCLB-approved plans. In other cases involving districts that were following NCLB guidelines, ELLs have relied on the EEOA's private right of action to enforce their rights.

ELLs face unique educational challenges, and states, school districts, and individual schools must address those challenges if ELLs are to receive equal educational opportunities. ELLs who speak less common native languages—as many Asian American ELLs do—face additional hurdles. In matters of resource allocation, programming, and assessment, smaller language minority groups often are overlooked, even within ELL populations in a particular school, state, or district. Asian American ELLs' educational needs may not be met even when their schools are operating under NCLB. Consequently, even in those schools operating under NCLB, the EEOA's guarantee of a right to equal educational opportunities for every student remains critical for ELLs, including for Asian American ELLs. For this and other reasons, this Court should affirm the court of appeals' decision.

ARGUMENT

I. Asian American ELLs Face Challenges That Illuminate The Issues in This Case.

Asian American ELLs face numerous educational challenges that result from the linguistic, cultural, and socioeconomic diversity of Asian American communities. Asian American ELLs come from more than 50 ethnic groups and speak more than 100 languages.[3] Nearly half of all Asian Americans between the ages of 5 and 17 speak an Asian or Pacific Islander language.[4] Almost one out of every four Asian American students is an ELL.[5] Although only five percent of the U.S. population, Asian Americans constitute 12 percent of all ELLs nationwide.[6] Asian Americans represent more than 10 percent of ELL populations in more than 28 states. *Id.* In Arizona, Asian Americans and Pacific Islanders make up nearly three percent of all public school and charter school enrollments, totaling

---

[3] Stacey J. Lee & Kevin K. Kumashiro, Nat'l Educ. Ass'n, *A Report on the Status of Asian Americans and Pacific Islanders in Education: Beyond the "Model Minority" Stereotype* xi (2005), *available at* www.nea.org/assets/docs/mf_aapireport.pdf.

[4] Asian Am. Legal Def. & Educ. Fund, *Left in the Margins: Asian American Students & the No Child Left Behind Act* 7 (2008) (hereafter, "*Left in the Margins*"), *available at* http://www.aaldef.org/docs/AALDEF_LeftintheMargins_NCLB.pdf.

[5] Randolph Capps, et al., Urban Inst., *The New Demography of America's Schools: Immigration and the No Child Left Behind Act* 27 (Sept. 2005), *available at* http://www.urban.org/UploadedPDF/311230_new_demography.pdf.

[6] *Left in the Margins*, *supra*, at 2.

approximately 32,000 students.[7] According to the 2000 Census, approximately 60 to 70 percent of Arizona's Asian American and Pacific Islander population is foreign born. *Id.* Approximately 9,100 Arizona children between the ages of 5 and 17 speak an Asian language at home. *Id.* at 40. Of those, about 29 percent speak English less than "very well," and 22 percent are classified as "linguistically isolated." *Id.*

Overall, Asian American ethnic groups have some of the highest rates of ELL students. More than half of Hmong Americans between ages 5 and 17 are ELLs.[8] Within the same age group, 39 percent of Vietnamese Americans, 34 percent of Bangladeshi Americans, and 33 percent of Cambodian Americans are ELLs. *Id.* Many of the Asian American ethnic groups with the highest rates of ELLs are Southeast Asian.[9] The additional needs of these communities often are obscured by the stereotype of high-achieving Asian American students.

---

[7] APAZI Coal., Ariz. State Univ. Asian Pac. Am. Studies Program & ASU for Ariz., *The State of Asian Americans & Pacific Islanders in Arizona* 39 (2008), *available at* http://apas.clas.asu.edu/pdfs/State_of_AAPI_in_AZ_2008.pdf. The cited study uses the term "Asian American Pacific Islander" students, aggregating Asian American students with those of Pacific Islander origin.

[8] *Left in the Margins, supra*, at 2.

[9] "Southeast Asian American" includes Cambodian, Laotian, Vietnamese, Khmer, and Hmong people. Max Niedzwiecki & T.C. Duong, Se. Asia Res. Action Ctr., *Southeast Asian American Statistical Profile* 9, 15 (2004), *available at* http://www.searac.org/seastatprofilemay04.pdf.

A. Asian American ELLs Face Challenges Common to All ELLs.

Asian American ELLs face many of the same obstacles to achieving academic success that confront other ELLs. For many Asian refugee communities, the trauma of displacement and upheaval of traditional structures make it difficult to navigate the American system, including in education.[10] Additionally, many Asian American ELLs struggle with poverty. For example, more than half of Hmong Americans and 40 percent of Cambodian Americans in California live in poverty.[11] Although only 13.5 percent of Chinese Americans live in poverty nationally, 91.9 percent of Chinese-speaking ELLs attending Boston public schools live in poverty.[12]

Across the country, ELLs have lower high school and college graduation rates, which holds true for Asian American ELLs. Among Cambodian American, Hmong American, and Laotian American

---

[10] Julie A. Hopkins et al., *Southeast Asian Refugee Youth: Implications for Juvenile Justice*, 45 Juv. & Fam. Ct. J. 15, 16-17 (1994).

[11] Asian Pac. Am. Legal Ctr. of S. Cal. et al., *The Diverse Face of Asians and Pacific Islanders in California: Asian & Pacific Islander Demographic Profile* 9 (2005), *available at* http://apalc.org/demographics/wp-content/uploads/2006/11/caapalc0905.pdf.

[12] Nicole Agusti et al., Mauricio Gaston Instit. for Latino Comty. Dev. & Pub. Policy, *Identification, Program Participation and Outcomes of English Learners in Boston Public Schools, AY 2003-2006*, manuscript at 19 (on file with authors) (forthcoming April 2009).

communities, 52.7 percent do not finish high school.[13] Although the college graduation rate for Asian Americans overall is 42.4 percent, for Vietnamese Americans it is only 16 percent.[14] For both Cambodian Americans and Laotian Americans, only approximately 5 percent graduate from college. *Id.*

B. Asian American ELLs Also Face Certain Unique Challenges.

The EEOA's requirement that ELLs receive appropriate language services and support is particularly important for Asian American ELLs, who collectively speak more than 100 different languages.[15] In California, eight out of the ten most common native languages for ELLs are Asian languages.[16] In New York City, the nation's largest public school system, school materials are published in eight languages, five of which are Asian languages. *Id.* at 4.

Many Asian American ELLs come from linguistically isolated households,[17] making

---

[13] C.N. Le, *Socioeconomic Statistics & Demographics*, Asian-Nation: The Landscape of Asian America (Mar. 15, 2009), http://www.asian-nation.org/demographics.shtml.

[14] Theresa Nguyen, *Asian Americans Must Enter Admissions Debate*, Yale Herald, Feb. 13, 2003, *available at* http://www.yaleherald.com/article-p.php?Article=1756.

[15] Lee, *supra*, at xi.

[16] *Left in the Margins*, *supra*, at 5.

[17] A linguistically isolated household is one "in which no one 14 years old or over speaks only English and no one who speaks a language other than English speaks English 'very well.'" U.S. Census Bureau, *We the Americans: Asians* 5 (1993).

navigation of the public education system an arduous task for them. Based on the 2000 Census, only 4.1 percent of all U.S. households are linguistically isolated.[18] In comparison, 46 percent of Vietnamese American households, 41 percent of Korean American households, and 35.3 percent of Chinese American households are linguistically isolated.[19] Furthermore, many Asian American ELLs come from families with little or no education. For many Asian American families, ELL students are the first to attend high school, or even to have any formal education.[20] Three out of five Southeast Asian American parents, for example, have less than three years of formal education. *Id.* Likewise, 45 percent of Hmong Americans and 26.2 percent of Cambodian Americans over the age of 25 have no formal schooling.[21] As such, linguistic isolation and lack of education frequently constitute formidable barriers to meaningful parental involvement in the education of many Asian American ELLs.

English as a Second Language ("ESL") and bilingual teacher shortages are pervasive, especially

---

[18] *Left in the Margins*, *supra*, at 10; *see* Hyon B. Shin & Rosalind Bruno, *Census Brief: Language Use and English-Speaking Ability: 2000* 10 (2003), *available at* http://www.census.gov/prod/2003pubs/c2kbr-29.pdf.

[19] *Left in the Margins* at 10-11.

[20] Khatharya Um, Se. Asia Res. Action Ctr., *A Dream Denied: Educational Experiences of Southeast Asian Youth* 6 (2003), *available at* http://www.searac.org/ydfinal-2_03.pdf.

[21] Niedzwiecki, *supra*, at 15.

among teachers who speak Asian languages.[22] Although ELLs are the fastest growing groups in K-12 education, only 2.5 percent of teachers nationwide have received appropriate training for the instruction of ELLs.[23] It is striking that there are even fewer qualified teachers who speak Asian languages. In California, for example, there is only one Hmong-speaking teacher for every 1,113 Hmong-speaking ELL students and only one Khmer-speaking teacher for every 21,000 Khmer-speaking ELL students.[24]

Asian American ELLs lack targeted education programs throughout the country. For instance, although Asian American ELLs make up over 12 percent of the ELL population in New York City, as of 2008 only five of the 70 dual language schools in the city focused on an Asian language.[25]

---

[22] *Left in the Margins, supra*, at 9. *Amici* note that the EEOA does not require bilingual education, but rather requires "appropriate language support" in whatever form that may take.

[23] Danling Fu & J. Graff, *The Literacies of New Immigrant Youth*, in Handbook of Adolescent Literacy Research 18 (Leila Christenbury et al. eds., 2008).

[24] Um, *supra*, at 9.

[25] New York City Dep't of Educ., Office of English Language Learners, *Spring 2009 Education Policy Panel Presentation* (2009), *available at* http://groups.google.com/group/manhattanpep?lnk= (follow "ELL Update 200902.pdf" hyperlink); New York City Dep't of Educ., Office of English Language Learners, *New York City's English Language Learners: Demographics* 7 (Summer 2008), *available at* http://print.nycenet.edu/NR/rdonlyres/3A4AEC4C-14BD-49C4-B2E6-8EDF5D873BE4/42968/2008_DemoReportFINAL.pdf.

II. Operation Under NCLB's Limited Requirements Does Not Ensure Appropriate Action under the EEOA.

Petitioners' argument in this case rests on two flawed assumptions: (1) that the EEOA and NCLB have the same purpose with respect to ELLs and (2) that NCLB provides specific standards for the implementation of adequate ELL programs, making the EEOA superfluous.

Although the EEOA and NCLB share certain general principles, they do not serve the same purpose with respect to ELLs. The EEOA requires educational agencies to take appropriate action to overcome language barriers that impede equal participation by students in instructional programs. To that end, the EEOA provides every individual student with the ability to redress a violation of their rights through a private right of action. That is not true of NCLB, which was enacted pursuant to the Congressional spending power and, at its core, is a funding statute that ties particular state academic achievement benchmarks for all students (including ELLs) to federal grant money.

While NCLB sets forth certain benchmarks for the standards and assessment systems of educational programs in states that receive NCLB funding, satisfaction of those requirements, in many circumstances, is not sufficient to constitute the "appropriate action" states must take under the EEOA to overcome barriers to ELLs' equal participation in education.

A. NCLB Requirements for Standards and Assessment Systems Have a Limited Focus and Do Not Address All Aspects of Education to Which the EEOA Broadly Applies.

The EEOA broadly aims to ensure that no individual student is deprived of an equal educational opportunity because of "the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. § 1703(f). The EEOA protects equal participation for ELLs in all instructional programs, regardless of the subject area or aspect of the educational program to which the language barrier pertains. *See* 20 U.S.C. § 1703(f); *see also Gomez v. Ill. State Bd. of Educ.*, 811 F.2d 1030, 1042-43 (7th Cir. 1987) (considering state guidelines and "what actually occurs in the classroom"). The EEOA thus applies to the full spectrum of educational programming available in a school.

In contrast, NCLB focuses on a limited range of specified subject areas in which student performance is measured, on a collective rather than individual basis. 20 U.S.C. § 6311(b)(2). Any state that desires to receive funding under NCLB must submit a plan to the DOE for approval. 20 U.S.C. § 6311(a)(1). Specifically, under NCLB, state and local education agencies must set standards for, test on, and report aggregated student scores for mathematics, reading/language arts, and science. *See* 20 U.S.C. § 6311(b)(1)(C); 20 U.S.C. § 6311(b)(3). Of those three subjects, states are accountable only for setting and meeting measurable performance

objectives in mathematics and reading/language arts. 20 U.S.C. § 6311(b)(2)(G)(i). If a state fails to meet the requirements set forth in Section 6311, the Secretary of Education may—but is not required to —withhold federal funds from the state. 20 U.S.C. § 6311(g)(2).

Because of their limited scope, NCLB's provisions cannot, and do not, address all aspects of education to which the EEOA applies. A state educational agency can satisfy NCLB standards as to mathematics and reading/language arts without meeting the broader "equal participation" requirement under the EEOA.

Further, although Title III (20 U.S.C. § 6841(a)(3)) of NCLB requires that ELLs take an annual English language proficiency exam, NCLB does not consider any individual test scores for accountability purposes, but instead assesses the Adequate Yearly Progress ("AYP") of students on a collective basis at the school, district, and state levels, with separate group measurements for students based on poverty, race and ethnicity, disability, and ELL status. 20 U.S.C. § 6841(b)(2)(C)(v). By holding states accountable only for *collective* AYP, NCLB by definition does not ensure that every *individual* ELL makes adequate yearly progress.

B. NCLB Does Not Provide a Reliable Benchmark for Measuring Whether Each Individual ELL Student is Receiving an Equal Educational Opportunity.

Several of NCLB's features make it possible for certain ELLs—often Asian American and other ELLs who speak less common languages—to slip through the cracks, even in schools and districts that operate pursuant to state plans approved under NCLB. As such, NCLB does not provide a reliable benchmark for measuring whether each ELL student in a given school or district is receiving equal educational opportunities under the EEOA.

1. NCLB Alone Fails to Ensure That Schools Meet Specific Needs of Discrete Populations of ELLs.

Although state educational programs implemented under NCLB may result in the provision of certain educational services for some ELLs, they still may fail to meet the specific needs of other discrete ELL populations. The lack of programs targeted at the needs of smaller language groups, such as Asian American ELLs, demonstrates the continued need for the EEOA as a mechanism to ensure equal educational opportunities for *all* ELLs. This problem is illustrated by the case of two Cambodian sisters who spoke no English, yet were placed in a mainstream English-only 5th grade classroom in San Antonio, Texas.[26] After six months,

---

[26] Wayne E. Wright & Xiaoshi Li, *Catching Up in Math: The Case of Newly-Arrived Cambodian Students in a Texas* (...continued)

despite having excelled academically in Cambodia, both girls performed poorly on the Texas math assessment. *Id.* at 17. The test was too linguistically complex and immersion in an English-only classroom had failed to provide them with the necessary English skills to take the test. *Id.*

A lack of native language assessments is another reason that the needs of Asian American ELLs are often inadequately addressed in programs implemented under NCLB. Many Asian American ELLs perform poorly on academic assessments simply because those assessments are too difficult for them linguistically.[27] Even in schools that develop model instructional programs—such as Wellstone International High School in Minneapolis, which serves 160 students who speak Somali, Amharic, Oromo, French, Tibetan, Vietnamese, Cambodian, Hmong, Spanish, and Russian—ELLs' success may be hampered by a lack of testing accommodations.[28] Minnesota offers no native language testing accommodations for ELLs, so the majority of Wellstone's students continue to struggle to pass Minnesota's Basic Skills Test, which they must pass to graduate. *Id.*

Intermediate School, 9 TABE J. 1, 3 (Spring/Summer 2006), *available at* http://www.tabe.org/members/Catching%20_up_in_Math.pdf.

[27] *See id.* at 17; *Left in the Margins*, *supra*, at 4.

[28] *See* Ruth Schultz & Craig Vana, *Coming to America: Minneapolis's Newcomer Program*, 65 Sch. Admin. 18 (2008), *available at* 2008 WLNR 22072615.

A recently proposed reauthorization draft of NCLB included a provision that would have required each state to develop and use native language assessments if 10 percent or more of ELLs throughout the state spoke the same native language.[29] However, such a *statewide* trigger would continue to exclude many Asian American ELL populations, including those who live in high concentrations in districts throughout the country but who make up a smaller proportion within their given states. *Id.* at 4-5. For example, in San Francisco County, 35.2 percent of ELLs speak Cantonese.[30] By contrast, at the state level in California, only 1.4 percent of ELLs speak Cantonese, well below the proposed 10 percent trigger. *Id.* In Seattle, 15.5 percent of ELLs speak Vietnamese; however, Vietnamese ELLs only account for 3.8 percent of ELLs statewide in Washington state.[31] Likewise, in Lowell,

---

[29] *Left in the Margins, supra,* at 4.

[30] Educ. Demographics Unit, Cal. Dep't of Educ., *Number of English Language Learners by Language, 2006-07, San Francisco* (Mar. 15, 2009), *available at* http://dq.cde.ca.gov/dataquest/LEPbyLang2.asp?cChoice=LepbyLang2&cYear=200607&TheCounty=38%2CSAN+FRANCISCO&cTopic=LC&cLevel=County.

[31] *Left in the Margins, supra,* at 5; *see* Seattle Pub. Sch., *Data Profile District Summary* (Dec. 2006), *available at* http://www.seattleschools.org/area/siso/disprof/2006/DP06demog.pdf; Pete Bylsma et al., Wash. Office of Superintendent of Pub. Instruction, *Educating English Language Learners in Washington State: Annual Report of the State Transitional Bilingual Instruction Program, School Year 2001-2002* 23 (Dec. 2003), *available at* http://www.k12.wa.us/research/pubdocs/BilingualreportDec2003.doc.

Massachusetts, 40 percent of ELLs are native Khmer (Cambodian) speakers, while only 4.1 percent of ELLs are native Khmer speakers in Massachusetts.[32]

2. NCLB "Standards" Fail to Establish a Consistent, Universal Measure of the Appropriateness of State Education Plans Because States Set Their Own Benchmarks.

The academic assessment and accountability provisions of NCLB fail to establish a consistent, uniform measure of the adequacy or appropriateness of state ELL education plans. Each state is permitted to design its own standards, assessments, and benchmarks, which are submitted to the DOE in a "Consolidated State Application and Accountability Workbook" for approval.[33] States also have considerable flexibility in defining subgroups and providing testing accommodations, which can cause large state-to-state disparities. As a consequence of the lack of true NCLB "standards," ELLs in different states experience wide variation in the quality of their education. *Amici* offer the following illustrations:

First, Title I of NCLB sets the base level of proficiency at the higher of (1) the proficiency rate for the lowest achieving student subgroup in the

---

[32] Mass. Dep't of Educ., *District and School Languages* (Mar. 2006), *available at* http://www.doe.mass.edu/ell/statistics/lep.html; *Left in the Margins*, *supra*, at 5.

[33] *See* U.S. Dep't of Educ., *Approved State Accountability Plans*, http://www.ed.gov/admins/lead/account/stateplans03/index.html (last visited Mar. 24, 2009).

state or (2) the proficiency rate of the school at the 20th percentile of overall performance statewide. 20 U.S.C. § 6311(b)(2)(E). In practice, the proficiency rate of the school at the 20th percentile of overall performance statewide is always a higher number, meaning that subgroups like ELLs start out below base-level proficiency.[34]

States must set intermediate proficiency benchmarks in equal increments, but are allowed to increase their improvement goals every three years rather than yearly. 20 U.S.C. § 6311(b)(2)(H). In practice, this has led many states to set intentionally modest initial goals over three-year stretches, with huge yearly jumps in improvement shortly before 2014. Back-loading large gains in AYP for later years masks the lack of progress by some groups during the earlier years.

A second example of NCLB's failure to set clear standards is its failure to specify the minimum number of students that must constitute a subgroup (known as the "n-size") for score-reporting or AYP. The lack of a standard n-size allows states to exclude smaller groups of ELLs and other vulnerable groups from assessment and, thereby, effectively ignore their educational progress. To count toward AYP, a group must be large enough to yield "statistically

---

[34] *See* Christine Rossell, *Making Uneven Strides: State Standards for Achieving English Language Proficiency Under the No Child Left Behind Act* 3 (2005); Thomas J. Kane & Douglass O. Staiger, *Unintended Consequences of Racial Subgroup Rules*, in *No Child Left Behind? The Politics and Practice of School Accountability* 152, 161 (Paul E. Peterson & Martin R. West eds., 2003).

reliable information" and not so small that it might reveal "personally identifiable information." 34 C.F.R. § 200.7(a)-(b). Each state is allowed to set out its own minimum n-size in its DOE-approved plan. The average n-size is 40, but the range is extremely broad and the definitions vary by state in complexity.[35] For example, Maryland uses a flat minimum of 5 students and New York uses 30 students, while Texas uses a school and/or district minimum of 50 students in a subgroup so long as they represent at least 10 percent of all students, or 200 students even if that group is less than 10 percent of all students.[36] It is possible, then, for a school in Texas to have 199 ELLs but still not have them count for school AYP if there are more than 2000 students in the school.

A lower n-size makes a school more likely to be held accountable for the performance of its subgroups. Superintendent Horne's 2008 complaint against the U.S. Department of Education illustrates why states have incentives to set a high n-size: "First, Arizona has large numbers of LEP students. In states where the number of LEP students is small, LEP student proficiency has little or no consequence

---

[35] Comm'n on No Child Left Behind, *The Commission's Recommendations in Practice: What the New N-size Policy Would Mean in California* (2007), *available at* http://staging.aspeninstitute.org/sites/default/files/content/docs/commission%20on%20no%20child%20left%20behind/NSizeBriefEditedFINAL25.8.071.pdf.

[36] *See Approved State Accountability Plans, supra,* § 5.5, *available at* http://www.ed.gov/admins/lead/account/stateplans03/index.html.

upon the ability of schools to make AYP...." *Horne v. United States Dep't of Educ.*, 2: 08-cv-01141, Complaint for Declaratory Judgment ¶ 16 (D. Ariz. June 19, 2008). Asian American ELLs in states with a higher n-size are likely to be overlooked, especially when a state's Asian population is small or geographically dispersed.

Further exacerbating the danger that vulnerable subgroups will be overlooked is NCLB's "safe harbor" exception for subgroups, under which schools will still meet AYP if (i) the percentage of students in the subgroup that did not meet proficiency decreased by at least 10 percent compared to the previous year and (ii) the subgroup made progress in a discretionary area of measurement such as grade-to-grade retention or attendance. 20 U.S.C. § 6311(b)(2)(I). A school whose goal is to have 60 percent of its ELLs proficient in reading/language arts could meet AYP even if it had only 30 percent of its ELLs attain proficiency in reading/language arts, provided that only 20 percent had been proficient the year before and the ELLs had made progress in their attendance rates. In the Nogales Unified School District in 2008, for example, fourth-, sixth-, and eighth-grade ELLs met the reading AYP only through use of this safe harbor.[37]

---

[37] *See* Ariz. Dep't of Educ., *School Report Cards*, http://www10.ade.az.gov/ReportCard/DistrictDetails.aspx?id=4457&ReportLevel=2 (available under "AYP" tab) (last visited Mar. 24, 2009).

Finally, under NCLB, states have discretion in specifying the academic content standards for state assessments that are tied to federal funding. "Since there is no central control of standards, states can get free money simply by making tests easier to pass."[38] A DOE report on testing standards under NCLB found that "[s]tates varied widely in the levels at which they set academic achievement standards to define student proficiency."[39] The report explained that states with higher standards tended to have a lower percentage of "proficient" students. *Id.* A similar study by the Fordham Institute compared state proficiency standards. That study found that Arizona had the second least restrictive AYP passage rates among the 28 states measured, which was partly attributable to relatively low proficiency standards in the early grades, particularly in reading, and to the fact that Arizona measures minimum n-size for subgroups by grade level rather than by school.[40] For instance, with Arizona's n-size set at 40 per grade level, a middle school could have 60 ELLs spread evenly between two grades and still not have any of those ELLs' scores count toward AYP.

---

[38] *The Teacher-in-Chief Speaks*, Economist, Mar. 14, 2009, at 31, *available at* http://www.economist.com/world/unitedstates/displaystory.cfm?story_id=13279059.

[39] Kerstin Carlson Le Floch et al., U.S. Dep't of Educ. Policy & Program Studies Serv., *State and Local Implementation of the No Child Left Behind Act, Vol. III, Accountability Under NCLB: Interim Report* 1 (2005).

[40] Thomas B. Fordham Inst., *The Accountability Illusion* (Feb. 19, 2009), *at* http://www.edexcellence.net/index.cfm/news_the-accountability-illusion.

In sum, NCLB does not provide "extensive" or "detailed" standards for improving the education of ELL students, as Petitioners argue. Rather, NCLB provides only a loose framework. The result is a lack of uniformity among states that allows some ELL students to be left behind. In addition to the various mechanisms by which ELL students may be excluded from assessment, ELL students are tested under widely varying conditions, usually in English—a language in which they are, by definition, not proficient. A student who meets the proficiency level in one state might not meet it in another state, because one state's "proficient" is another's "deficient." This system falls well short of ensuring that every ELL student receives equal educational opportunities, as the EEOA requires.

3. NCLB Assessments May Underestimate Educational Progress by ELLs in Some Cases and Overestimate It in Others.

For several reasons, whether a school is making AYP under NCLB is not an accurate measure of the academic content that ELLs are learning.

First, optional regulatory exemptions under NCLB provide ways for a state to exclude ELLs' test scores so that they do not adversely affect a school's AYP, which in turn masks deficiencies in ELLs' learning of academic content. *See* 34 C.F.R. § 200.6(b)(2)-(4).

Second, ELLs' scores on NCLB assessments are inconsistent indicators of their actual educational progress because the DOE allows schools

to group former ELLs' scores with current ELLs' scores for up to two years after the former ELLs have been reclassified as English proficient. 34 C.F.R. § 200.20(f)(1). This practice may diminish the contrast between ELL and non-ELL performance within ethnic subgroups, which in turn may have an especially important impact on Asian American ELLs, who are members of a number of distinct ethnic groups.

Finally, ELLs, by definition, are not yet proficient in English, but, under NCLB, many ELLs must take their core subject tests in English after only one year in an American school system. *See* 34 C.F.R. § 200.6(b)(4).

C. EEOA Violations Have Occurred in Schools Are Operating Under NCLB.

While all 50 states have NCLB plans approved by the DOE,[41] school districts in various states nevertheless have been found or alleged to violate the EEOA, as acknowledged in consent decrees obtained by the Department of Justice and as documented in other cases described below. These examples refute Petitioners' argument that the NCLB sets a "benchmark" for compliance with the "appropriate action" requirement of the EEOA.

---

[41] *See* Press Release, U.S. Dep't of Educ., *President Bush, Secretary Paige Celebrate Approval of Every State Accountability Plan under No Child Left Behind* (June 10, 2003), *available at* http://www.ed.gov/news/pressreleases/2003/06/06102003.html.

1. EEOA Investigations by the DOJ Have Resulted in Consent Decrees Against and Settlements Involving Schools Operating Under NCLB.

The federal government's pursuit of EEOA complaints in school districts operating under NCLB demonstrates that the DOE's approval of a state's programmatic requirements is not enough to ensure compliance with the EEOA. The Civil Rights Division of the United States Department of Justice ("DOJ") oversees enforcement of civil rights laws on behalf of the federal government, which includes enforcing "federal statutes which prohibit discrimination in public elementary and secondary schools," including the EEOA.[42] In several cases, the DOJ's efforts have resulted in court-monitored consent decrees or out-of-court settlements that mandate a school district's compliance with the EEOA as to educational programs for ELLs.[43]

In *United States v. City of New York*, No. CV-04-248 (E.D.N.Y. June 29, 2004), the DOJ brought a lawsuit under the EEOA against the New York City Department of Education for violating the rights of predominantly Asian American ELLs at Lafayette High School in Brooklyn, New York. Lafayette High

---

[42] U.S. Dep't of Justice, Civil Rights Div., *Civil Rights Activities and Programs* (2006 ed.), *available at* http://www.usdoj.gov/crt/activity.php.

[43] U.S. Dep't of Justice, Civil Rights Div., *Educational Opportunities Section Case Summaries*, http://www.usdoj.gov/crt/edo/documents/casesummary.php (last visited Mar. 24, 2009).

School is located in Bensonhurst, a historically Italian enclave that recently experienced a large increase in its immigrant Asian population.[44] The DOJ alleged, based on a two-year investigation of Lafayette High School, that the New York City Department of Education "denied ELL students at [the school] equal educational opportunities by failing to take appropriate action to overcome language barriers that impeded these students' equal participation in the school's instructional programs[.]" *City of New York*, Consent Decree at 2 (filed June 1, 2004). Specifically, the DOJ found that "the ELL program at [Lafayette] suffer[ed] from deficiencies [in] assessment, class placement, academic counseling, monitoring of exited students, and communication with ELL parents and students[.]" *Id.* The DOJ and the New York City Department of Education entered into a three-year consent decree mandating, among other things, procedures and a timeline for English assessment and placement, programmatic and curricular equality for ELLs, access to counseling and other services for ELLs, certified and qualified teachers for ELLs, and appropriate interpretation and translation services for ELLs' parents. *Id.* at 10-18.

After an investigation concerning the treatment of Bound Brook, New Jersey's predominantly Spanish-speaking ELLs, the DOJ pursued a 2003 settlement under the EEOA with the

---

[44] Fernanda Santos, *For Italians in Brooklyn, Voices On The Streets Have Changed*, N.Y. Times, Jan. 6, 2009, *available at* http://www.nytimes.com/2009/01/07/nyregion/07italians.html.

local school district. Similarly after an investigation concerning equal educational access in Lewiston, home to Maine's growing Somali refugee population, the DOJ entered into a 2007 settlement agreement under the EEOA with the local school district. Both agreements mandate, among other things, procedures to identify and place ELLs; an interpretation and translation policy; curricular alignment between ELL instruction and state content instructional standards; ELL instructional training for both English as a Second Language and content area teachers; equitable teacher student ratios for ELLs; and equal access for ELLs to all extracurricular activities, resources, and school programming.[45]

2. There Also Are Documented Problems in Cases Outside of the DOJ Enforcement Context.

Outside the DOJ enforcement context, there are additional instances in which school districts operating under NCLB have suffered from documented problems in providing all ELLs with access to equal educational opportunities through NCLB plans. These examples demonstrate that merely implementing an education program under NCLB does not guarantee compliance with the EEOA's requirement that a school "follow through

---

[45] *See* Settlement Agreement between the United States & Bound Brook, N.J. Bd. of Educ. 3-9, *available at* http://www.usdoj.gov/crt/edo/documents/bbrookag.pdf; Settlement Agreement between the United States & Lewiston, Me. Sch. Dep't 3-5, *available at* http://www.usdoj.gov/crt/edo/documents/LewistonAgree..pdf.

with practices, resources, and personnel" necessary to "implement effectively the educational theory adopted by the school," and achieve a "parity of participation with other students" for ELLs. *Castañeda v. Pickard*, 648 F.2d 989, 1008-10 (5th Cir. 1981).

Recent changes implemented by the New York City Department of Education ("NYCDOE") highlight the tension between meeting accountability requirements and providing an equal education. In 2002, the NYCDOE began an initiative to replace large, failing high schools with new, smaller high schools.[46] These small schools represent a potential opportunity for New York City's ELLs—who make up 14 percent of the overall public school student population and speak 152 languages—but only if the small schools serve ELLs effectively.[47] ELLs

---

[46] The NYCDOE defines a small school as having approximately 500 students or less. New York City Dep't of Educ., *High School Enrollment Choices*, http://schools.nyc.gov/ChoicesEnrollment/High/Choices/default.htm (last visited Mar. 24, 2009); *see* Advocates for Children et al., *So Many Schools, So Few Options: How Mayor Bloomberg's Small High School Reforms Deny Full Access to English Language Learners* 5 (Nov. 2006) (hereafter, "*2006 Report*"), *available at* http://www.advocatesforchildren.org/pubs/2005/ellsmallschools06.pdf.

[47] More than 12 percent of the New York City ELL population is Asian American. New York City Dep't of Educ., Office of English Language Learners, *Spring 2009 Education Policy Panel Presentation* (2009), *available at* http://groups.google.com/group/manhattanpep?lnk= (follow "ELL Update 200902.pdf" hyperlink).

enrolled in high school account for more than 12 percent of the total ELL student population.[48]

In schools where ELLs are served, early signs indicate that New York City's small high school program may benefit ELL students.[49] Yet, most small high schools do not serve ELLs, and the majority of ELLs in small schools are concentrated in a few that are dedicated specifically to serving their needs.[50] Local advocates, including New York State United Teachers Vice-President Maria Neira, have called on the State Educational Commissioner to "take immediate and deliberate action" in response to the "systematic crisis" for ELLs in New York City, specifically identifying the problem of lack of access by ELLs to new small high schools over the last three to four years.[51] ELL students are being denied

---

[48] New York City Dep't of Educ., Office of English Language Learners, *Designing Better High Schools for ELLs: Research Summary* 1 (Spring 2008), *available at* http://schools.nyc.gov/NR/rdonlyres/E5BF4C47-6C62-4D67-8449-6AC894F3E0A4/39554/HSResearchSummary_2008_FINALReadOnly.pdf.

[49] For example, approximately 85 percent of ninth grade ELLs in small schools were promoted to tenth grade, as compared with a 20 percent lower rate for ELLs in all other schools. *2006 Report*, *supra*, at 6. Seventy-five percent of ELLs in small schools earn at least ten credits in ninth grade – a key predictor of on-time graduation – compared to 56 percent of ELLs in other high schools citywide. New York City Dep't of Educ., News & Speeches, *Mayor, Chancellor Announce the Opening of 42 New Schools in September* (Mar. 1, 2009), *available at* http://schools.nyc.gov/Offices/mediarelations/NewsandSpeeches/2008-2009/20090301_new_schools.htm.

[50] *2006 Report*, *supra*, at 29.

[51] Coal. for Educ. Excellence for English Language Learners, Open Letter to N.Y. Educ. Comm'r Richard Mills, *Responding to*

(...continued)

full access to small high school options offered by the New York City public school system.[52] Even when ELL students are able to gain access to small high schools, many of those schools do not provide the mandated ELL programming. *Id.* at 7-8.

NCLB provides no solution for the access issues that ELL students face with respect to the NYCDOE high school reforms. Nor does NCLB expose deficiencies in the ELL programming itself. There may be no ELL students in a school, or too few ELLs (New York uses an n-size of 30) to make a difference in the yearly testing results that monitor school and district compliance under NCLB.[53] For example, based on its 2006-07 performance, Pelham Preparatory Academy in the Bronx was found to be "In Good Standing" under NCLB.[54] Yet, according to its official course schedule, the school offered no English-fluency classes during the 2006-07 academic year for its 11 eligible ELL students.[55] ELL students in New York City high schools have been faced with

---

the Systematic Crisis for English Language Learners (ELLs) in New York City, Aug. 18, 2008, *available at* http://www.nysut.org/cps/rde/xchg/nysut/hs.xsl/k12_10761.htm.

[52] *See 2006 Report*, *supra*, at 29.

[53] *See Approved State Accountability Plans*, *supra*, § 5.5, *available at* http://www.ed.gov/admins/lead/account/stateplans03/index.html.

[54] New York City Dep't of Educ., *Progress Report 2007-08 for Pelham Preparatory Academy*, http://schools.nyc.gov/OA/SchoolReports/2007-08/ProgressReport_HS_X542.pdf (last visited Mar. 24, 2009).

[55] Samuel G. Freedman, *English Language Learners as Pawns in the School System's Overhaul*, N.Y. Times, May 9, 2007.

the unenviable decision of choosing between enrollment in a small school with no ELL program or enrollment in a larger school with ELL programs, but which otherwise provides an inadequate education.[56]

Seattle, Washington, whose residents include large populations of recently immigrated Vietnamese, Cambodian, Lao, Hmong, and Mien refugees, as well as long-standing Japanese, Chinese, and Filipino populations dating back to the 1800s, provides another example of schools meeting accountability requirements under NCLB while not meeting the educational needs of individual ELL students.[57] Nearly one in four of the approximately 45,000 students enrolled in Seattle Public Schools is an ELL. *Id.* at 8. Asian American students constitute approximately 40 percent of all Seattle ELLs. *Id.* Although Spanish is the most commonly spoken native language among Seattle's ELLs, the most commonly spoken languages for Seattle's Asian American ELLs are Vietnamese, Cantonese, and Tagalog. *Id.*

---

[56] *See* Meredith Kolodner, *English-Only Rise in New York City High School Graduation Rates*, Daily News, Feb. 22, 2009 (noting that ELL students comprised more than a quarter of the student body at two large high schools recently closed).

[57] Council of the Great City Sch., *Raising the Achievement of English Language Learners in the Seattle Public Schools: Report of the Strategic Support Team of the Council of Great City Schools* 88, 94 (2008), *available at* http://www.seattleschools.org/area/strategicplan/CGCS_Bilingual_Review_Report.pdf.

Despite Seattle's implementation of an education plan approved by the DOE under NCLB, a 2008 study found Seattle's ELL program to be "highly fragmented, weakly defined, poorly monitored, and producing very unsatisfactory academic results."[58] *Id.* The report concluded that "[n]o overarching theory of action appears to be guiding the instruction of [ELLs], and that "[t]he school system does not have a clear set of goals for addressing the needs of [ELLs]." *Id.* at 5-6, 22, 24-25. Among the problems are a lack of sufficient professional development in ELL teaching methodology for teachers of English and other subjects and undue reliance on instructional assistants. *Id.* at 6, 26-27, 41-44. Further, Seattle's student registration and placement process chronically under-identifies ELLs and inadequately monitors ELLs' academic progress. *Id.* at 6. Many of these deficiencies identified by the study were similar to those found by the DOJ in its EEOA investigations, which resulted in consent decrees or settlement agreements, as described in Section IV.C.2.

Similar problems have been reported in school districts across the country. Notably, many districts and states suffer from a lack of certified teachers for ESL classes as well as a dearth of teacher training in ELL methodologies. For example, the state of Minnesota has just one certified ELL instructor for every 49 students, compared with a national average

---

[58] *See* Seattle Pub. Sch., *No Child Left Behind*, http://www.seattleschools.org/area/main/Nochildleftbehind.xml (last visited Mar. 20, 2009).

of one teacher for every 19 students.[59] Other districts have experienced difficulty finding ESL teachers to serve rapidly expanding ELL populations. In 2004, for instance, a majority of Charlotte-Mecklenberg Schools' 17 open teaching positions were for ESL teachers.[60] Similarly, teachers certified in ESL represent a "critical shortage area" in New York City.[61]

In Chicago, Illinois, Eun Young Lee, a staff member at the Korean American Resource and Cultural Center, reports that some students are not adequately assessed before being placed into ELL programs, and that testing to advance out of ELL programs is inconsistent.[62] Other local advocates concur that ELL assessment—both at initial student enrollment and in subsequent years—is inconsistent across different schools.[63]

---

[59] Megan Boldt, *Report: Minnesota Schools Preparing Students for Success – Mostly. But English Learning Services Faulted*, St. Paul Pioneer Press, Jan. 6, 2009.

[60] Tiffani Helgberg, *Demand For ESL Grows at CMS*, WCNC Local News for N.C., Aug. 17, 2004, http://www.wcnc.com/news/local/stories/wcnc-081704-ds-limitedengishstudents.881cde02.html.

[61] New York City Dep't of Educ., *Subject Areas, available at* http://schools.nyc.gov/TeachNYC/WhoWeLookFor/SubjectAreas/subjectareas.htm.

[62] Telephone interview by Brian Redondo with Eun Young Lee, Citizenship and Youth Coordinator, Korean Am. Res. & Cultural Ctr. (Mar. 3, 2009).

[63] Telephone interview by Brian Redondo with Alvin Yu, Dir. of Multi-Cultural Youth Project, Chinese Mut. Aid Ass'n (Mar. 4, 2009).

ELLs and their parents often also face challenges accessing interpretation and translation services, even where schools or districts are operating under NCLB requirements. A lack of properly trained staff and inadequate procedures make these challenges particularly acute for smaller language groups, such as Asian Americans. The School District of Philadelphia's parent handbook, for example, is the only document that the district consistently translates into Khmer (Cambodian).[64] Translation of a document into Khmer often takes upwards of four to six weeks, far longer than translations into more common languages such as Spanish. *Id.*

A lack of appropriate staff, services, or instructional support to serve ELLs also can effectively prevent ELLs from participating in school programs, even where schools are operating under NCLB. As described above, ELLs in New York City face difficulty accessing appropriate services at many smaller schools. Similarly, ELLs in Minneapolis, Minnesota cannot participate in a successful voluntary integration program—one in which participating students of color outperform nonparticipating students of color on statewide tests.[65] According to the Minneapolis Public School's

---

[64] Interview by Khin Mai Aung with Rorng Sorn, Executive Dir., Cambodian Ass'n of Greater Philadelphia, in Philadelphia, Pa. (Mar. 12, 2009).

[65] Patrice Relerford, *Standing Room Only Crowd Tells Mpls. School Officials: Keep Voluntary Integration Program*, Star Tribune, Mar. 6, 2009, *available at* http://www.startribune.com/local/south/40828062.html.

Director of Student Placement Services, "The reason we don't place [ELLs in schools participating in the voluntary integration program] is they don't have the staff or programs in place to support ELL students." *Id.* Similarly, ELLs in Sacramento, California have difficulty accessing school-run preparation courses for the state high school exit examination. According to Pa Kou Vang of the Hmong Women's Heritage Association, Hmong American ELLs are not adequately informed about these courses and cannot fully participate because they are taught in English.[66]

D. The EEOA Protects the Rights of Individual ELL Students in Ways that NCLB Does Not.

Differences in the enforcement mechanisms available under the EEOA and NCLB are emblematic of the statutes' distinct purposes—protection of individual rights under the EEOA, and targeted, funding-related educational reform under NCLB. As Respondents Flores and Rzeslawski note in their brief, the EEOA expressly provides individual students with the ability to redress violations of their rights through a private right of action in a federal district court. Respondents' Brief at 53. In contrast, NCLB does not. 20 U.S.C. § 6311(g)(2); *see Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002) ("'In legislation enacted pursuant to the spending power, the typical remedy for state

---

[66] Telephone interview by Brian Redondo with Pa Kou Vang, Program Manager, Hmong Women's Heritage Ass'n (Mar. 16, 2009).

noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State.'") (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981)).

Enforcement mechanisms are critical for ELLs, who historically have relied on federal court enforcement of the EEOA to ensure that schools and educational institutions are taking "appropriate action" to meet their unique educational needs—including where the school or district in question was operating under NCLB guidelines.[67] At the same time, courts consistently have denied individual efforts to enforce rights under NCLB because "the overall structure of the [NCLB] supports the

---

[67] *See, e.g.*, *Gomez v. Ill. State Bd. of Educ.*, 811 F.2d 1030, 1044 (7th Cir. 1987) (reversing dismissal of Spanish-speaking ELL students' EEOA claims); *United States v. Texas*, 572 F. Supp. 2d 726, 766 (2008) (finding that indicators used to monitor state's ELL program "may be effective in facilitating compliance with the incremental improvements required for all students for NCLB, but the indicators are inadequate as a basis for intervention to ensure the current rights of individual students as required by the EEOA." (citation omitted); *Leslie v. Bd. of Educ. for Ill. Sch. Dist. U-46*, 379 F. Supp. 2d 952, 956, 961 (N.D. Ill. 2005) (denying motion to dismiss EEOA claims by ELL students against school district operating under NCLB regulations); *Heavy Runner v. Bremner*, 522 F. Supp. 162, 165 (D. Mont. 1981) (denying summary judgment on EEOA claims by Blackfoot-speaking ELL students); *Rios v. Read*, 480 F. Supp. 14, 23-24 (E.D.N.Y. 1978) (holding that school district's bilingual education program violated Puerto Rican and Hispanic ELL students' rights under the EEOA, following a bench trial).

conclusion that Congress did not intend to confer enforceable individual rights...."[68]

For Asian American ELLs, the opportunity to bring a private action in federal court to enforce the right to a meaningful education under the EEOA is especially critical. Asian Americans are relatively few in number and speak many distinct languages and dialects.[69] The number of Asian American ELLs who speak a particular language in a given state or region may be dwarfed by ELL speakers of other languages, such as Spanish.[70] As a consequence, the educational needs of those Asian American ELLs may be overlooked, even in a school or school district

---

[68] *Newark Parents Ass'n v. Newark Pub. Sch.*, 547 F.3d 199, 212 (3d Cir. 2008); *see, e.g., Doe v. Westerville City Sch. Dist.*, No. 2:07-cv-00683, 2009 WL 29876, at 2 (S.D. Ohio Jan. 5, 2009) (finding that NCLB "provides no express procedure by which individuals may enforce its requirements."); *Fresh Start Acad. v. Toledo Bd. of Educ.*, 363 F. Supp. 2d 910, 916 (N.D. Ohio 2005) (finding that by committing NCLB enforcement to the Secretary of Education, "Congress did not intend to provide for piecemeal enforcement by individuals across the country."); *Ass'n of Cmty. Orgs. for Reform Now v. New York City Dep't of Educ.*, 269 F. Supp. 2d 338, 342 (S.D.N.Y. 2003) (noting that the "Penalties" section of NCLB "contains no procedure for parents or students to seek judicial, administrative, or any other remedies for alleged noncompliance with the dictates of the [NCLB].").

[69] *See* U.S. Census Bureau, CENSR-17, *We the People: Asians in the United States* 11 (2004); *see also* U.S. Census Bureau, C2KBR/01-16, *The Asian Population: 2000* 5, 9 (2002).

[70] *See* Anneka L. Kindler, Nat'l Clearinghouse for English Language Acquisition & Language Instruction Educ. Programs, *Survey of the States' Limited English Proficient Students & Available Educational Programs & Services, Summary Report* 20-22 (2002); *see also Left in the Margins, supra*, at 4-5.

that is operating under an education plan approved by the federal DOE under NCLB.[71]

ELL speakers of less common languages historically have relied on the federal courts to protect their rights to an equal education under the EEOA. *See, e.g.*, *Heavy Runner*, 522 F. Supp. at 163 (seeking equal education for ELLs who speak the Blackfoot language). That protection is especially important to Asian American ELLs, among whom ELL speakers of a single language in a particular school district may be too few in number to trigger provisions requiring native language assessment under NCLB-approved state plans that look to statewide numbers.[72]

---

[71] *See* Darnell Little & Azam Ahmed, *Struggling Asians Go Unnoticed, Poor Grades Lumped in with Standout Students*, Chicago Tribune, Mar. 30, 2008, at C1; *see also United States v. Texas*, 572 F. Supp. 2d 726, 766 (2008).

[72] *See, e.g.*, *Left in the Margins*, *supra*, at 4 (noting that although 19.9 percent of ELLs in New York City speak one of five Asian languages, no single Asian-language-speaking ELL group meets New York's statewide 10 percent threshold for developing and using native language assessments).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

Kenneth Kimerling
Khin Mai Aung
Cecilia Chen
Asian American Legal Defense & Education Fund
99 Hudson Street 12/F
New York, NY 10013-2815
(212) 966-5932

Robert A. Long, Jr.
Counsel of Record
Stanley Young
Deanna L. Kwong
Geoffrey T. Painter
Erin R. Archerd
Covington & Burling LLP
1201 Pennsylvania Ave. NW
Washington, DC 20004
(202) 662-6000

Counsel for Amici Curiae

Amy L. Barton
Paul, Weiss, Rifkind, Wharton & Garrison LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 373-3000

Counsel for Advocates for Children of New York

MARCH 2009

APPENDIX

Amici Curiae in Support of Respondents

Asian American Legal Defense and Education Fund

The Asian American Legal Defense and Education Fund ("AALDEF"), headquartered in New York City and founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF's Educational Equity and Youth Rights Project promotes the rights of Asian American students in kindergarten through 12th-grade public education. AALDEF works in various jurisdictions discussed herein to protect English Language Learner students' right to curricular and programmatic equality, and coordinates the National Asian American Education Advocates Network ("NAAEA Network"). Many of the amici groups listed herein are members of the NAAEA Network.

Advocates for Children of New York

Advocates for Children of New York ("AFC") is dedicated to ensuring access to New York City's best public education services or all students, especially students of color, students from low-income backgrounds, immigrant students, and ELLs. For more than 37 years, AFC has provided a range of direct services, including free individual case advocacy, technical assistance, and trainings, and has worked on institutional reform of educational policies and practices through advocacy and litigation.

Arizona Asian American Bar Association

The Arizona Asian American Bar Association ("AAABA") seeks to provide a vehicle and forum for the unified expression of opinions and positions by its members regarding current social, political, economic, legal, and other issues of concern to Asian Americans, particularly in the state of Arizona. As such, AAABA has an interest in this litigation's impact on Arizona's growing Asian American ELL student population.

Asian American LEAD

Asian American LEAD promotes the well-being of low income Asian American youth and families in Washington, D.C. and Maryland through education, leadership development, and community building. Many of Asian American LEAD's student members are either recent immigrants or children of immigrants, and are often ELLs.

Asian Immigrant Women Advocates

Asian Immigrant Women Advocates ("AIWA"), founded in 1983, empowers low income, limited English proficient Asian immigrant women and youth in Oakland, California to stimulate positive changes in their workplaces, schools, communities, and broader society. AIWA conducts education, leadership development, and collective action, enabling women and youth to fight for dignity and justice in their working and living conditions. AIWA's Youth Build Immigrant Power project develops the leadership capacity of low-income Cantonese speaking immigrant youth and fights to obtain equal access for ELLs in Oakland public schools.

Asian Law Alliance

The Asian Law Alliance ("ALA"), founded in 1977, provides equal access to the justice system to the Asian and Pacific Islander communities in Santa Clara County, California. As an organization that provides legal services to limited English proficient Asian and Pacific Islander immigrants and refugees, ALA is concerned with the adequacy of ELL programs in Santa Clara County public schools and has advocated to expand such programs.

Asian Pacific American Legal Resource Center

The Asian Pacific American Legal Resource Center ("APALRC") advances the legal and civil rights of Asian Americans through direct services, education, and advocacy in Washington, D.C., Maryland, and Virginia. APALRC addresses the legal needs of low income and limited English proficient Asian Americans and advocates for broad-based systemic change concerning their legal and civil rights. Due to APALRC's language access advocacy, APALRC has an interest in protecting the overlooked needs of ELLs and addressing local public schools' failure to provide equal educational opportunity for Asian American ELLs.

Asian Pacific Community in Action

Asian Pacific Community in Action ("APCA") is dedicated to improving the health and well being of the Asian Pacific Islander community in the greater Phoenix area, Arizona. APCA focuses on providing culturally and linguistically appropriate services to Arizona's Asian and Pacific Islander population, and targets its services toward low income immigrants.

APCA has a particular interest in the well being of Asian and Pacific Islander children and youth.

Asian Pacific Islander Legal Outreach

Asian Pacific Islander Legal Outreach ("API Legal Outreach"), founded in 1975, promotes culturally and linguistically appropriate services for the most marginalized segments of San Francisco and Oakland, California's Asian Pacific Islander community. Based on its work on a variety of social justice issues including language, immigrant, and youth rights, API Legal Outreach believes firmly in equal access to education for ELLs.

Asian Pacific Islander Youth Promoting Advocacy and Leadership

Asian Pacific Islander Youth Promoting Advocacy and Leadership ("AYPAL") runs youth identified and youth run direct action organizing campaigns for school and community change to improve the lives of Asian Pacific Islander youth in Oakland, California. Among other things, AYPAL's organizing campaigns have addressed the needs and concerns of Oakland's ELL student population, and many of AYPAL's youth members are current or former ELLs.

Boston Chinatown Neighborhood Center

The Boston Chinatown Neighborhood Center ("BCNC") seeks to enrich and improve the quality of life for Boston, Massachusetts' Asian American community and for residents of Boston's Chinatown, South End, and South Cove communities by providing bilingual education, child care, cultural, social, youth and recreational programs. BCNC serves immigrant youth through ESL classes,

homework help, and leadership and enrichment programs. BCNC believes strongly that Chinese American and other ELLs deserve equal educational opportunities.

Cambodian Association of Greater Philadelphia

The Cambodian Association of Greater Philadelphia ("CAGP") provides social, health, and education programs for Cambodian refugees and their families in Philadelphia, Pennsylvania. CAGP provides innovative and unique bilingual programs to meet the combined academic, social, economic, and health needs of Philadelphia's Cambodian community. Recognizing the importance of public education, CAGP organizes local high school aged youth to speak out concerning their needs and interests in public school.

Center for Pan Asian Community Services, Inc.

The Center for Pan Asian Community Services, Inc. ("CPACS") creates and delivers culturally competent and comprehensive social and health care services to immigrants, refugees, and racial or ethnic minorities in the greater Atlanta, Georgia region. CPACS provides English as a Second Language classes and runs a youth development program tailored toward ELL students. CPACS believes in the importance of comprehensive ELL services to help immigrant and refugee students and families fully integrate into society.

Chinese for Affirmative Action

Chinese for Affirmative Action ("CAA"), based in San Francisco, California, was founded in 1969 to protect

the civil and political rights of Chinese Americans and advance multiracial democracy in the United States. Today, CAA is a progressive voice in and on behalf of the broader Asian and Pacific American community, advocating for systemic change that protects immigrant rights, promotes language diversity, and remedies racial injustice. CAA leads community efforts to improve the quality of education for Asian Pacific American and immigrant students by promoting quality ELL programs, effective language services, and meaningful school integration.

Coalition for Asian American Children and Families

The Coalition for Asian American Children and Families ("CACF"), based in New York City, is the nation's only pan-Asian children's advocacy organization dedicated to promoting the health and well-being of Asian Pacific American children and families. CACF believes that access to quality academic programs and services is vital to strengthening academic achievement and life-long success for ELL students.

Detroit Asian Youth Project

The Detroit Asian Youth Project ("DAY Project") seeks to develop leadership skills in and raise consciousness among Asian American youth in Detroit, Michigan. DAY Project engages youth, some of whom are current or former ELLs, through community-based projects to promote a greater understanding of Detroit and its Asian American community.

Hmong American Partnership

Hmong American Partnership ("HAP") is a social service and community development organization empowering the Hmong community of Saint Paul and Minneapolis, Minnesota. HAP provides culturally sensitive social services as well as housing, community and economic development opportunities, and promotes the Hmong community's rich cultural heritage. HAP works with Saint Paul Public Schools and ELL students who are affected by issues relating to racial, economic, and language disparities.

Multi-Cultural Youth Project

The Multi-Cultural Youth Project ("MCYP"), based in Chicago, Illinois, is a collaboration of youth agencies nurturing and empowering youth to embrace and act upon their potential to transform their lives and communities. Originally founded by the Chinese Mutual Aid Association, MCYP cultivates youth leaders—including current and former ELLs—who stand in solidarity and actively partner with others fighting for local and global social justice. MCYP seeks to equip youth with the life, leadership, and organizing skills to lead healthy lives, build meaningful relationships, and create new ways of addressing community issues.

National Korean American Service & Education Consortium

The National Korean American Service & Education Consortium ("NAKASEC") is a national non-profit organization based in Los Angeles, California with a Washington D.C. office. Founded in 1994, NAKASEC is a multi-issue civil and human rights organization serving the Korean American

community, projecting a national progressive voice for Koreans Americans and promoting their full participation in the United States. To this end, NAKASEC promotes equitable and just changes to this country's political and legislative systems through education, policy advocacy, grassroots organizing, and community mobilization.

ONE Lowell

ONE Lowell is a community-based organization that works to improve the life, opportunities, and civic involvement of culturally diverse people in Lowell, Massachusetts. ONE Lowell is dedicated to increasing the integration and self sufficiency of Lowell's immigrant community by strengthening civic participation, developing strong leadership, and increasing access to vital services. ONE Lowell's School Success for Newcomers Initiative advocates for the interests of ELL students and their families in Lowell's public schools.

Providence Youth Student Movement

The Providence Youth Student Movement ("PrYSM"), based in Providence, Rhode Island, is a Southeast Asian youth-led organization with a clear and passionate vision for social change. PrYSM mobilizes youth members—including current and former ELLs—into organizing campaigns building community-based power for Southeast Asians, and provides services and programming for youth including a General Education Development program for out of school youth.

United Chinese Association of Brooklyn

The United Chinese Association of Brooklyn ("UCA") is the first nonprofit social service agency serving the immigrant Chinese community of Bensonhurst, Brooklyn, in New York City. UCA mobilizes community resources to protect immigrants' civil rights, defend them against discrimination, and provide needed social services. UCA works with AALDEF to organize Chinese immigrants and other ELL students, and advocate for their educational rights in Bensonhurst neighborhood public schools.

Vietnamese American Young Leaders Association of New Orleans

The Vietnamese American Young Leaders' Association of New Orleans ("VAYLA-NO") is a youth led, youth organizing, and youth development community-based organization in New Orleans, Louisiana. VAYLA-NO empowers Vietnamese American and other underrepresented youth—including current and former ELLs—through direct services, cultural enrichment, and social change advocacy.

Washington Asian Pacific Islander Families Against Substance Abuse

The Washington Asian Pacific Islander Families Against Substance Abuse ("WAPIFASA") is a non-profit agency serving Asian and Pacific Islander youth and youth of color in greater Seattle, Washington. WAPIFASA provides culturally competent and age appropriate direct services and social programming for youth—including current and former ELLs—and their families.

AMICUS CURIAE BRIEF

Nos. 08-289, 08-294

In The Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF ARIZONA,

and

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES AND PRESIDENT OF THE ARIZONA SENATE,

Petitioners,

v.

MIRIAM FLORES, INDIVIDUALLY AND AS PARENT OF MIRIAM FLORES, MINOR CHILD; ROSA RZESLAWSKI, INDIVIDUALLY AND AS PARENT OF MARIO RZESLAWSKI, MINOR CHILD; STATE OF ARIZONA; AND MEMBERS OF THE ARIZONA STATE BOARD OF EDUCATION IN THEIR OFFICIAL CAPACITIES,

Respondents.

On Writ Of *Certiorari* To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF CIVIL RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

*Nina Perales
David G. Hinojosa
Mexican American Legal Defense And Educational Fund
110 Broadway St., Suite 300
San Antonio, TX 78205
(210) 224-5476

Roger L. Rice
Jane E. López
Multicultural Education, Training & Advocacy, (META Inc.)
240A Elm St., Suite 22
Somerville, MA 02144
(617) 628-2226

**Counsel of Record*

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

CESAR A. PERALES
JOSE PEREZ
DIANA SEN
LATINOJUSTICE PRLDEF
99 Hudson Street, 14th Floor
New York, NY 10013
(212) 219-3360

JOHN T. AFFELDT
TARA KINI
PUBLIC ADVOCATES, INC.
131 Steuart Street, Suite 300
San Francisco, CA 94105
(415) 431-7430

DANIEL R. ALONSO
W. STEWART WALLACE
MICHAEL DENVIR
KAYE SCHOLER LLP
425 Park Avenue
New York, NY 10022
(212) 836-8000

Attorneys for Amici

TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 1

INTRODUCTION 2

STATUTORY BACKGROUND 4

I. The Equal Educational Opportunities Act... 4

II. The No Child Left Behind Act 7

SUMMARY OF ARGUMENT 11

ARGUMENT 12

I. Congress Never Intended for NCLB to Preclude Civil Rights Actions Brought Under the EEOA 12

A. There is no Evidence of Congressional Intent in NCLB to Preclude EEOA Causes of Action 13

1. Congress Never Considered the Private Right of Action Under the EEOA 14

2. The Courts Have Developed a Working Definition of "Appropriate Action" That Fulfills the Purpose of the EEOA 15

B. NCLB and the EEOA Work in Harmony 17

C. Congress Never Intended to Repeal or Otherwise Preclude Actions Under the EEOA for Individuals Against States... 18

TABLE OF CONTENTS – Continued

Page

II. Petitioners Overstate the Operation and Remedial Scheme of NCLB 21

A. NCLB is Subject to Re-authorization ... 22

B. Petitioners Concede Various Aspects of "Appropriate Action" Under the EEOA Were Neither Required by NCLB Nor Approved by the USDOE 23

C. In Contrast to the EEOA, NCLB Does not Address Equal Opportunity for All Parts of an Educational Program 24

D. The Accountability Provisions of NCLB Exclude Thousands of ELL Students ... 25

1. NCLB's Provisions Exclude Large Numbers of ELL Students due to Grade Exclusion 27

2. When There are Fewer Than 40 Students in the ELL Group, Arizona ELL Students Are Excluded for Accountability Purposes 29

3. Arizona's Application of a 99% Confidence Level Further Excludes ELL Students for Accountability Purposes 32

4. The Meaning of "Making Adequate Yearly Progress" Does not Necessarily Equate to Success for all ELL Students..... 34

TABLE OF CONTENTS – Continued

Page

5. Not all School Districts with ELL Students Participate in Title III Funded Programs 36

E. Many ELLs Who are Failing to Demonstrate Proficiency on State Assessments are in Districts and Schools Satisfying all the Accountability Requirements of NCLB 37

III. Petitioners' Interpretation of the EEOA Would Embroil the Court in Oversight of NCLB 38

CONCLUSION 41

TABLE OF AUTHORITIES

Page

CASES

American Hosp. Ass'n v. NLRB, 499 U.S. 606 (1991) 14

Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981) 14, 16, 22, 25

Erlenbaugh v. United States, 409 U.S. 239 (1972) 17

Fitzgerald v. Barnstable, 129 S. Ct. 788 (2009) 13, 16, 17, 21

Flores v. Arizona, 516 F.3d 1140 (9th Cir. 2008) 2

Gomez v. Illinois State Bd. of Education, 811 F.2d 1030 (7th Cir. 1987) 14, 16

Harrison v. PPG Indus., 446 U.S. 578 (1980) 15

Herman & MacLean v. Huddleston, 459 U.S. 375 (1983) 21

Idaho Migrant Council v. Bd. of Education, 647 F.2d 69 (9th Cir. 1981) 16

Lau v. Nichols, 414 U.S. 563 (1974) 5, 6

Morton v. Mancari, 417 U.S. 535 (1974) 13

Newark Parents Ass'n v. Neward Pub. Sch., 547 F.3d 199 (3d Cir. 2008) 10

Pennsylvania R.R. v. Sonman Coal Co., 242 U.S. 120 (1916) 20

United States v. Estate of Romani, 523 U.S. 517 (1998) 17

United States v. Fausto, 484 U.S. 439 (1988) 19, 20

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Bilingual Education Act 10

EEOA as Title II to the Educational Amendments Act of 1974 (Pub. L. No. 93-380, title II, 88 Stat. 515 (1974)) 10, 16

20 U.S.C. § 1226 22

20 U.S.C. § 1234 9

20 U.S.C. § 1703 ..... *passim*

20 U.S.C. § 1706 7

20 U.S.C. § 6301 ..... 7, 10

20 U.S.C. § 6311 ..... *passim*

20 U.S.C. § 6314 9

20 U.S.C. § 6316 ..... 26, 34

20 U.S.C. § 6812 ..... 8, 24

20 U.S.C. § 6821-6826 8

20 U.S.C. § 6823 10

20 U.S.C. § 6824 36

20 U.S.C. § 6825 9

20 U.S.C. § 6842 ..... 8, 26

20 U.S.C. § 6847 ..... 11, 12

20 U.S.C. § 6913 10

20 U.S.C. § 6914 10

20 U.S.C. § 6951 10

TABLE OF AUTHORITIES – Continued

Page

20 U.S.C. § 6965 10

20 U.S.C. § 6983 10

20 U.S.C. § 7121 10

20 U.S.C. § 7801 25

20 U.S.C. § 7902 2

REGULATIONS

34 C.F.R. § 200.20 24

34 C.F.R. § 200.55(c) 25

73 Fed. Reg. 22020, 22022 (Apr. 23, 2008) 31

LEGISLATIVE HISTORY

President Nixon, Special Message to Congress on Equal Educational Opportunities and School Busing, 118 Cong. Rec. 8931 (Mar. 17, 1972) 4, 7

118 Cong. Rec. 9012 (Mar. 20, 1972) 5

118 Cong. Rec. 28865 (Aug. 17, 1972) 6

H.R. 13915, § 201(f) 5, 6

H.R. Rep. No. 92-1335, at 3 (1972) 5

President Nixon, Address to the Nation on Equal Educational Opportunities and School Busing, 1972 Pub. Papers 425 (1972) 4

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Arizona Department of Education, *Arizona's School Accountability System Technical Manual,* Vol. II. (2004), *available at* http://azed.gov/azlearns/NCLB_Technical_Manual_2003.pdf 29

Arizona Department of Education, *Arizona's School Accountability System 2006 Technical Manual, Volume II: Adequate Yearly Progress* (2007) 33

Arizona Republic, *An uncertain future for 'No Child Left Behind'* (2009), *available at* http://www.azcentral.com/arizonarepublic/local/articles/2009/01/25/20090125ednochild01 23

Arizona Department of Education, *Research and Evaluation Section* (Oct. 2008) 28

Arizona Department of Education, Personal Communication to Roger Rice, Re: 00-ADE Data Request (Feb. 2, 2009) 27

State of Arizona Consolidated State Application Accountability Workbook (July 3, 2008) 29, 35

California Dep't of Educ., *2008 Adequate Yearly Progress Report Information Guide* (Nov. 2008), *available at* http://www.cde.ca.gov/ta/ac/ay/documents/infoguide08r.pdf 27

Commission on No Child Left Behind, *Beyond NCLB: Fulfilling the Promise to Our Nation's Children* (Washington, D.C.: The Aspen Institute, 2007) 29, 32

TABLE OF AUTHORITIES – Continued

Page

Kevin Carey, *The Pangloss Index: How States Game the No Child Left Behind Act* (2007), *available at* http://www.educationsector.org/usr_doc/The_Pangloss_Index.pdf 36

Erin Dillon & Andrew J. Rotherham, *State's Evidence: What It Means to Make 'Adequate Yearly Progress' Under NCLB,* Education Sector (2007).....29, 32

Ellen Forte Fast & William J. Erpenback, *Revisiting Statewide Educational Accountability Under NCLB, Council of Chief State School Officers* (2004) 34

Goldwater Institute, *Opting Out of No Child Left Behind* (2008).....23

Walt Haney et al., *The Education Pipeline in the United States, 1970-2000*, 10 (2004) 29

The Heritage Foundation, *Reforming No Child Left Behind by Allowing States to Opt Out: An A-Plus for Federalism* (2007) 23

Decision Letter on Request to Amend Arizona Accountability Plan, Letter, Henry L. Johnson to Tom Horne (Sept. 15, 2005), *available at* http://www.ed.gov/print/admins/lead/account/letters/acaz3.html.....29, 35, 40

Sen. Edward M. Kennedy, *Foreword*, Winter 2006 Issue, Harv. Educ. Rev. (2006), *available at* http://www.hepg.org/document/9/.....23

TABLE OF AUTHORITIES – Continued

Page

Mass. Dept. of Elementary and Secondary Education, *No Child Left Behind Title III: Language Instruction for Limited English Proficient & Immigrant Students Program*, *available at* http://www.doe.mass.edu/ell/titleIII.html (last visited Mar. 23, 2009) 37

National Clearinghouse for English Language Acquisition and Language Instruction Educational Programs, *The Growing Numbers of Limited English Proficient Students 1995/96-2005/06* (Dec. 5, 2006), *available at* http://www.ncela.gwu.edu/policy/states/reports/statedata/2005LEP/GrowingLEP_0506.pdf 3

Gail L. Sunderman, *The Unraveling of No Child Left Behind: How Negotiated Changes Transform The Law*, The Civil Rights Project, Harvard University (Feb. 2006) 38

New York State Education Department, *No Child Left Behind Allocations for Title III, Part A For New York State Public School Districts and Charter Schools* 2006-2007 (Dec. 5, 2006), *available at* http://www.emsc.nysed.gov/funding/cladcep/0607/titleIIIallocs0607rev8-9-06.htm 37

Wayne C. Riddle, *CRS Report for Congress, Education for the Disadvantaged: Reauthorization Issues for ESEA Title I-A Under the No Child Left Behind Act* (2006) 32

TABLE OF AUTHORITIES – Continued

Page

David Rogosa, *Statistical Misunderstandings of the Properties of School Scores and School Accountability,* in *Yearbook of the National Society for the Study of Education*, Vol. 104, 165-6 (2005) 33

David Rogosa, *The NCLB "99% confidence" scam: Utah-style calculations,* Stanford University (November 2003) *available at* http://www-stat.stanford.edu/~rag/nclb/utahNCLB.pdf 33

U.S. Dep't of Education, *Supplement Not Supplant Provision of Title III of the ESEA*, *available at* http://ed.gov/programs/sfgp/supplefinalattach1.doc 18

U.S. Dep't of Education, Letter to California, (Jan. 8, 2009), *available at* http://www.ed.gov/admins/lead/account/cornerstones/ca.pdf 30

U.S. Dep't of Education, *Non-Regulatory Guidance, Supplemental Educational Services* (2009), *available at* http://www.ed.gov/ policy/elsec/guid/suppsvcsguid.pdf 26

U.S. Dep't of Education Office of English Language Acquisition, Language Enhancement, and Academic Achievement for Limited English Proficient Students, *The Biennial Report to Congress on the Implementation of the Title III State Formula Grant Program, School Years 2004-06* (June 2008), *available at* http://www.ed.gov/about/offices/list/oela/title3biennial0406.pdf 3

TABLE OF AUTHORITIES – Continued

Page

U.S. Dep't of Education, *National Assessment of Title I Final Report* (2007) 28

Warren Institute, *Analysis of 2008 NCLB Accountability for ELL Students in California, available at* http://www.law.berkeley.edu/3164.htm.....28, 30, 38

Wayne E. Wright, Education Policy Study Laboratory, Language Policy Research Unit (LPRU), *Evolution of Federal Policy and Implications of No Child Left Behind for Language Minority Students* (Arizona State University) (January 2005), *available at* http://epicpolicy.org/files/EPSL-0501-101-LPRU.pdf.....30

STATEMENT OF INTEREST[1]

Amici are various civil rights organizations and public interest centers whose efforts include litigation, public policy and general advocacy to protect the civil rights of persons to equal educational opportunities. The *amici* include the Mexican American Legal Defense and Educational Fund (MALDEF), the Multicultural Education, Training & Advocacy, (META) Inc., LatinoJustice PRLDEF (formerly known as the Puerto Rican Legal Defense and Education Fund), Public Advocates, the Earl Warren Institute on Race, Ethnicity & Diversity and the Education Law Center. Each *amicus* has experience in securing the rights of English Language Learner ("ELL") students to access appropriate language programs and has a substantial interest in the outcome of this case. The individual statements of interest of all *amici* appear in the Appendix.

---

[1] Respondent Flores filed a letter consenting to the filing of this brief with the Clerk of the Court. Respondent State of Arizona and Petitioners have signed letters consenting to the filing of this brief and those letters are being filed with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

This is a school finance case involving how Arizona finances public education for ELL students. As the court of appeals summarized, "The particulars of Arizona's school funding system are therefore at the heart of this case."[2] In sum, the district court issued a series of orders requiring Arizona to conduct a study of the costs of educating ELL students and to fund programs rationally related to the costs required for those students. Arizona's most recent response to these orders is an enactment known as HB 2064, which the court of appeals has found to have two specific flaws.[3]

Amici file this brief focusing on Petitioners' far-reaching argument that Arizona's compliance with provisions of the Elementary and Secondary Education Act (the "No Child Left Behind Act" or "NCLB") satisfies their obligation to take "appropriate action" under the Equal Educational Opportunities Act ("EEOA"). Petitioners advance baseless arguments by

---

[2] *Flores v. Arizona*, 516 F.3d 1140, 1147 (9th Cir. 2008). The detailed history of the litigation is found in the opinion of the court of appeals. *Id.* at 1140-1154.

[3] The court found that the "clearest violation of federal law" pertained to the state's violation of 20 U.S.C. § 7902 which provides that in determining a school district's eligibility for state aid, a state may not take into account federal funds. *Id.* at 1178. Petitioners did not address the 20 U.S.C. § 7902 issue in their briefs. The court of appeals also found that a two-year limitation on state ELL aid was irrational. *Amici* agree with the court on both counts.

misreading provisions of NCLB in a way that undercuts 30 years of federally-protected civil rights for millions of ELL school children across the country. As of the 2005-2006 school year, there were more than five million ELL students attending schools in the U.S., a 57.17% increase over the past decade.[4]

While Petitioners supposedly seek judicial non-interference with local control, the implications of their argument would plunge the federal courts into greatly expanded involvement in day-to-day educational policy decisions. *Amici* respectfully request that the Court refuse this intrusive invitation and affirm the decision of the courts below.

---

[4] National Clearinghouse for English Language Acquisition and Language Instruction Educational Programs, *The Growing Numbers of Limited English Proficient Students 1995/96-2005/06*, *available at* http://www.ncela.gwu.edu/policy/states/reports/statedata/2005LEP/GrowingLEP_0506.pdf. Spanish is the language of approximately 80% of these students. U.S. Dep't of Education Office of English Language Acquisition, Language Enhancement, and Academic Achievement for Limited English Proficient Students, *The Biennial Report to Congress on the Implementation of the Title III State Formula Grant Program, School Years 2004-06* (June 2008), *available at* http://www.ed.gov/about/offices/list/oela/title3biennial0406.pdf.

STATUTORY BACKGROUND

I. The Equal Educational Opportunities Act

The EEOA was born from President Nixon's address to the nation on March 16, 1972, in which he proposed a new law that "would further establish an educational bill of rights for [those] who start their education under language handicaps, to make certain that they, too, will have equal opportunity." President Nixon, Address to the Nation on Equal Educational Opportunities and School Busing, 1972 Pub. Papers 425 (Mar. 16, 1972).

President Nixon affirmed that this goal could only be achieved if ELL students are included in the learning process: "School authorities must take appropriate action to overcome whatever language barriers might exist, in order to enable all students to participate equally in educational programs." President Nixon, Special Message to Congress on Equal Educational Opportunities and School Busing, 118 Cong. Rec. 8931 (Mar. 17, 1972). He further clarified that the educational opportunity afforded to all schoolchildren must "not only [be] equal, but adequate." *Id.*

Days later, the EEOA was introduced in the U.S. House of Representatives and stated that "[n]o state shall deny equal educational opportunity to an individual on account of his race, color, or national origin, by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its

instructional programs." 118 Cong. Rec. 9012 (Mar. 20, 1972); H.R. 13915 § 201(f). Regarding the EEOA's explicit requirement that states eliminate language barriers for ELL students, the committee hearing the bill explained:

> [T]he committee bill for the first time in Federal Law contains an illustrative definition of a denial of equal educational opportunity. It is the purpose of that definition . . . to provide school and governmental authorities with a clear delineation of their responsibilities to their students and employees and to provide the students and employees with the means to achieve enforcement of their rights.

House Comm. on Educ. and Labor, H.R. Rep. No. 92-1335, at 3 (1972).

The Committee recognized that the statute, among other purposes, was designed to ensure that ELL students received equal educational opportunities. "As President Nixon has stated, these children will not have true equality of educational opportunity until these language . . . barriers are removed." *Id.* at 6. Speaking prior to this Court's decision in *Lau v. Nichols*, 414 U.S. 563 (1974), Rep. Veysey recognized that the EEOA:

> establishes for the first time an express requirement that schools take affirmative action to overcome language barriers that impede equal participation by students. This provision especially aids [those] whose language and cultural barriers have been ignored

> for far too long. Provisions like this are essential to achieving true equality of educational opportunity for all our citizens.

118 Cong. Rec. 28865 (Aug. 17, 1972).[5]

Congress ultimately enacted the EEOA as Title II to the Educational Amendments Act of 1974 (Pub. L. No. 93-380, title II, 88 Stat. 515 (1974)), shortly after this Court's decision in *Lau v. Nichols*, 414 U.S. 563 (1974). There, the Court stated:

> Basic English skills are at the very core of what these public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those basic skills is to make a mockery of public education. We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful.

Id. at 569 (1974) (citing, *inter alia*, Office of Civil Rights regulations and policies requiring school districts to take affirmative steps to rectify English language deficiencies of their students so that they may participate effectively in public educational programs).

Congress also included an enforcement component, providing a private right of action for students to enforce their civil rights when states or school

---

[5] The 1972 bill, as set forth in H.R. 13915, passed the House, but was ultimately defeated in the Senate.

districts fail to take "appropriate action" to remove existing "language barriers." 20 U.S.C. § 1706. Congress' inclusion of a private right of action to allow ELL students to bring suit to remove language barriers reflects Congress' recognition that the EEOA established for the courts, in President Nixon's words, a "new and broader base on which to decide future cases" involving educational civil rights. President Nixon, Special Message to Congress on Equal Educational Opportunities and School Busing, *supra*.

II. The No Child Left Behind Act

NCLB is an educational funding authorization statute that requires states that accept federal funds under the Elementary and Secondary Education Act ("ESEA") for public education to comply with certain accountability measures designed to improve "the academic achievement of all students." 20 U.S.C. § 6301(4). The major provisions addressing ELL academic achievement are Titles I and III, which contain an overlapping accountability framework for monitoring ELL educational progress in English Language Arts ("ELA") and math.

Title I requires that districts and schools, as a condition of receipt of Title I funds, make "Adequate Yearly Progress" ("AYP") for all students, including for various identified subgroups, such as ELLs. AYP is primarily determined by the percentage of students

overall, as well as in each subgroup, who score "proficient" on state ELA and math assessments. 20 U.S.C. § 6311(b)(2)(B)-(C).

Title III of NCLB, a statutory grant program known as the English Language Acquisition, Language Enhancement and Academic Achievement Act ("Title III"), is specifically designed to provide funds to "help ensure that children who are limited English proficient . . . attain English proficiency . . . and meet the same challenging State academic content and student achievement standards as all children are expected to meet." 20 U.S.C. § 6812(1). Title III grants aid to states upon receipt of plans approved by the federal government. *See id.* at §§ 6821-6826. Title III incorporates Title I AYP accountability for ELLs by requiring that Title III-funded districts meet AYP for ELLs, in addition to meeting objectives demonstrating ELL progress in learning English. 20 U.S.C. § 6842(a).[6]

The text of NCLB demonstrates that Title III was conceived to act as a gradual means to improve ELL achievement in English and mathematics. 20 U.S.C. §§ 6311(b)(2)-(3), 6842(a)(3). In contrast to the immediate, rights-based framework of the EEOA, NCLB's accountability measures that require adequate yearly progress for ELL children threaten only removal of

---

[6] However, the parental accountability and program improvement provisions of Title I do not apply to the progress in learning English provisions of Title III.

federal funding. Indeed, the statute merely authorizes and does not guarantee federal funding for these programs; its effectiveness is thus tied to available funds.

As a result, Title III specifically instructs that federal funds provided to states under NCLB shall be used only to "supplement" funds already earmarked by states for ELL programs; supplanting pre-existing public funds is prohibited. 20 U.S.C. § 6825(g). 20 U.S.C. § 6314(a)(2)(B) expressly states that:

> A school participating in a schoolwide program shall use funds available to carry out this section only to supplement the amount of funds that would, in the absence of funds under this part, be made available from non-Federal sources for the school, including funds needed to provide services that are required by law for children with . . . limited English proficiency.

Id. The statute goes on specifically to state that a "school that chooses to use funds from such other programs shall not be relieved of the requirements relating to . . . civil rights [and] uses of Federal funds to supplement, not supplant non-Federal funds. . . ." *Id.* § 6314(a)(3)(B). Violation of this requirement may lead to the loss of all federal funds. *Id.* § 1234(a)-(i). Likewise, the predecessor of Title III, the Bilingual Education Act, contained similar "supplement" not "supplant" funding requirements which persisted through five amendments over three decades, attesting to Congress' long-standing, consistent dedication

to ensuring that states honor their educational civil rights obligations to their students independently of Title III or its predecessor statute.[7]

NCLB expressly states that it does not amend or repeal any statutes other than the ESEA. 20 U.S.C. § 6301. Furthermore, the text of both Title III of NCLB and its predecessor show that they are meant to work in conjunction with other ELL programs administered by the Department of Education to maximize federal efforts aimed at serving ELL children.[8]

NCLB also has purely administrative mechanisms for remedying state and local deficiencies in meeting its standards. *See Newark Parents Ass'n v. Newark Pub. Sch.*, 547 F.3d 199, 209 n.5 (3d Cir. 2008). At the same time, it contains a savings clause: "Nothing in this part shall be construed in a manner

---

[7] Under the Bilingual Education Act, federal funds were required to be allocated to supplement and, to the extent practicable, increase the level of state and local funds made available – but in no case supplant such funds. *See* Public Law 90-247 (Jan. 2, 1967), § 705(a)(4); Public Law 93-380 (August 21, 1974), § 721(b)(3)(A); Public Law 95-561 (Nov. 1, 1978), § 721 (b)(3)(G); Public Law 98-511 (Oct. 19, 1984), § 721(f)(4); Public Law 100-297 (Apr. 28, 1988), § 7032(e); Public Law 103-382 (1994), §§ 7116(h)(4), 7134(f).

[8] *See* 20 U.S.C. §§ 6823, 6913, 6914, 6951, 6965, 6983; Public Law 100-297, Sec. 7051 (Apr. 28, 1988). Coordination of Title VII education programs with other programs, including the Goals 2000: Educate America Act and other Acts to "secure the most flexible and efficient use of Federal funds" was also envisioned. *See id.* at § 7121.

inconsistent with any federal law guaranteeing a civil right." 20 U.S.C. § 6847.

SUMMARY OF ARGUMENT

Congress never intended for a state's compliance under NCLB to substitute for an obligation under the EEOA to take appropriate action to overcome language barriers. Petitioners fail to cite any legislative history of NCLB to indicate such congressional intent or any intent to eliminate ELL students' private right of action to sue states under the EEOA. On the contrary, Congress expressly noted its intent to preserve ELL students' private right of action by including a savings clause in NCLB for protection of civil rights under federal laws, such as the EEOA.

Furthermore, NCLB is not the all-encompassing, comprehensive statute suggested by Petitioners. NCLB is a statute whose authorization has lapsed and whose future is unknown. Nonetheless, Petitioners ask this Court to equate the EEOA to the current version of NCLB, which neither covers the entire instructional program nor requires "appropriate actions" such as trained English as a Second Language teachers or state monitoring of ELL programs. Under NCLB, nearly half the ELL students in Arizona and California are not counted for accountability purposes because they are in grades K-2 or 9, or found in subgroups of fewer than 40 (or, in California, 100) or attend high schools which do not receive

ESEA/NCLB funding. The use of various statistical devices allows schools and the State of Arizona to meet AYP under NCLB even though most of their ELL students are not proficient in reading or mathematics. For that subset of schools not receiving Title I federal funding and for Title III-funded districts generally, the parental accountability requirements of the NCLB do not apply.

Finally, Petitioners unnecessarily invite the federal courts to become embroiled in detailed oversight of what it means to comply with NCLB statute. Should the Court accept Petitioners' argument, federal judges will be tasked with the responsibility of determining whether varying degrees of NCLB "compliance" among the states meet the statutory requirements and Congressional intent of NCLB and whether states are taking appropriate action under the EEOA.

ARGUMENT

I. Congress Never Intended for NCLB to Preclude Civil Rights Actions Brought Under the EEOA

In drafting NCLB, Congress inserted a savings clause to preserve existing civil rights under other federal laws, including the right of ELL students to equal educational opportunities under the EEOA. *See* 20 U.S.C. § 6847. Nevertheless, Petitioners ask the

Court to conclude that Congress chose to allow states to comply with NCLB instead of requiring appropriate action under the EEOA without Congress saying so. Such an interpretation would erroneously lead to the repeal of the ELL individual's right of action under the EEOA against state defendants. Such repeals are disfavored. *See Morton v. Mancari*, 417 U.S. 535, 549 (1974). Indeed, this Court has stated repeatedly that the central question in deciding whether one statute precludes a cause of action in a preceding statute is whether Congress intended it to do so. *Fitzgerald v. Barnstable*, 129 S. Ct. 788, 793-94 (2009). Petitioners have failed to present any cogent argument or evidence demonstrating such congressional intent.

A. There is no Evidence of Congressional Intent in NCLB to Preclude EEOA Causes of Action

The crux of Petitioners' argument is that Congress enacted NCLB to fulfill the obligations of states to take "appropriate action" under the EEOA. However, Petitioners' argument contradicts basic canons of statutory interpretation because Petitioners cannot point to any evidence that Congress ever considered the EEOA's requirements when drafting and adopting the NCLB – with the lone exception, vitiating Petitioners' position, of Congress' inclusion of its savings clause in NCLB. In addition, the EEOA's private right of action has allowed the lower courts to develop standards for measuring "appropriate action" under

the EEOA congruent with its principal purpose of protecting the civil rights of ELL students to access equal educational opportunities and overcome language barriers. *See, e.g., Castaneda v. Pickard,* 648 F.2d 989, 1009 (5th Cir. 1981); *Gomez v. Illinois State Bd. of Education*, 811 F.2d 1030 (7th Cir. 1987). Despite this well-established precedent, there exists no evidence that Congress ever considered undoing these recognized and accepted judicial standards in enacting NCLB.

1. Congress Never Considered the Private Right of Action Under the EEOA

Petitioners do not argue that Congress ever debated the merits or the history of the EEOA's private right of action when enacting NCLB. Instead, Petitioners rely on the converse: that by never mentioning the EEOA or "appropriate action," Congress must have intended to allow states to satisfy their obligations under the EEOA by meeting the requirements outlined in NCLB. This argument turns statutory construction canons on their head and finds no support in the cases cited by Petitioners.

This Court has refused to draw inferences about Congress' intent to repeal preceding statutes when Congress fails even to mention the purported change in the legislative history of the successive statute. *See, e.g., American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 613-14 (1991) ("If this amendment had been

intended to place the important limitation on the scope of the Board's rulemaking powers that petitioner suggests, we would expect to find some expression of that intent in the legislative history.") (citing *Harrison v. PPG Indus.*, 446 U.S. 578, 602 (1980) ("In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.")) As in the cases cited above, Petitioners reference no legislative history of NCLB indicating Congress' intention to sweep away the EEOA's private right of action against states.

2. The Courts Have Developed a Working Definition of "Appropriate Action" That Fulfills the Purpose of the EEOA

Petitioners also wrongly assert that the Court should substitute the remedial scheme in NCLB for the obligations of states under the EEOA because the term "appropriate action" is ambiguous and therefore must be interpreted under the NCLB statute. NCLB and ESEA are not the same or even "successive" statutes amending the ESEA.[9] In fact, the ESEA

---

[9] The EEOA is Title II to the Education Amendments of 1974 but it did not amend the Elementary and Secondary Education Act of 1965. Title I of the ESEA is specifically named "Amendments to the Elementary and Secondary Education Act

(Continued on following page)

existed both before and after the EEOA, the statutes were codified under different chapters, and both have existed harmoniously for 35 years. Furthermore, Petitioners' interpretation defeats Congress' purpose for the EEOA, which is to require states and education agencies to take "appropriate action" in addressing the needs of ELL students and to provide an avenue for judicial redress. As this Court has stated, courts must interpret statutes in a manner that fulfills the intent of Congress. *Fitzgerald*, 129 S. Ct. at 788. The lower courts have assumed this task and developed a working definition of "appropriate action."

In *Castaneda v. Pickard*, the Fifth Circuit developed a three-prong test in order to decide whether an education agency has taken "appropriate action" under the EEOA. 648 F.2d 989, 1009 (5th Cir. 1981). The Fifth Circuit required: that ELL programs be based on sound pedagogical theory; that the theory be supported with the appropriate practices, personnel and resources; and that the programs be successful in actually helping students to overcome their language barriers. *Id.* at 1009-1010. This test has been adopted consistently by appellate courts across the country. *See, e.g., Gomez*, 811 F.2d 1030; *Idaho Migrant Council v. Bd. of Education*, 647 F.2d 69 (9th Cir. 1981).

---

of 1965." Thus, the EEOA is not an amendment to ESEA but falls under the "other purposes" language of the Act's stated purpose. Pub. L. No. 93-380, 88 Stat. 515 (1974).

This existing body of law defining "appropriate action" never once caused Congress to consider amending NCLB to address the courts' interpretation of "appropriate action." This further evidences Congress' intent to have the EEOA and NCLB co-exist and the remedy under the EEOA to be unaffected. *See Fitzgerald*, 129 S. Ct. at 797 (in failing to find congressional intent in Title IX to repeal § 1983 claims, the Court emphasized the importance of the state of the law interpreting § 1983 claims when Title IX was enacted).

B. NCLB and the EEOA Work in Harmony

Because the EEOA and NCLB operate in tandem to meet the needs of ELL students, there is no basis on which to conclude that the latter statute supplants the obligations of the former. *See United States v. Estate of Romani*, 523 U.S. 517 (1998) ("we think the proper inquiry is how best to harmonize the impact of the two statutes"). Although two statutes may have the same overall goal, their different roles in achieving that goal remain relevant in determining whether one statute overrides another. *See Erlenbaugh v. United States*, 409 U.S. 239 (1972) (finding that an exception under one anti-gambling statute did not apply to another anti-gambling statute because the two laws served different roles although both were aimed at stopping organized crime).

The EEOA and NCLB share part of the same goal in enabling ELL students to become proficient in

English, and although their functions are different, they complement one another rather than conflict. As stated above, the EEOA is a federal civil rights statute that allows individual ELL students to sue when their state has denied them equal educational opportunities. *See* Statutory Background, *supra*. Conversely, NCLB is a federal funding statute that potentially allows the federal government to withhold funds from voluntarily participating states when they fail to adhere to specific program requirements. *See id*. However, these differences show that the statutes are complementary rather than in conflict.[10]

C. Congress Never Intended to Repeal or Otherwise Preclude Actions Under the EEOA for Individuals Against States

Petitioners attempt to side-step this Court's unwillingness to repeal congressional statutes by judicial fiat, stating that they do not seek a repeal of

---

[10] This is further evidenced by the supplement-not-supplant provision of Title III. The Department of Education has interpreted the supplement-not-supplant section as drawing a distinction between funds from NCLB and funds which the state must raise to comply with the EEOA. U.S. Dep't of Education, *Supplement Not Supplant Provision of Title III of the ESEA*, *available at* http://ed.gov/programs/sfgp/supplefinalattach1.doc ("This requirement is . . . based on the . . . [EEOA] . . . Therefore, the use [of] . . . Title III funds to provide core language instruction educational programs . . . would violate the supplement not supplant provision . . . as such services are required to be provided by States and districts regardless of the availability of Federal Title III funds.").

the EEOA, only that they should not be held to the EEOA's standard of "appropriate action" in light of NCLB's specific requirements pertaining to the education of ELL students.[11] However, Petitioners' citation to *United States v. Fausto,* 484 U.S. 439, 452 (1988), for their theory that "the implications of a statute may be altered by the implications of a later statute" is unavailing here. (*See* Superintendent's Br. at 60). Unlike the judicially-created implied action in *Fausto*, the EEOA has an express cause of action; consequently, there is no "judicial interpretation" to repeal.

In *Fausto*, the Court found that Congress created the Civil Service Reform Act "to replace the haphazard arrangements for administrative and judicial review of personnel action, part of the 'outdated patchwork of statutes and rules built up over almost a century.'" *Id.* at 444. The Court also noted the widespread abuse of the administrative and judicial review processes by civil service employees. *Id.* at 445. As a result, the Court found that although there was not an express repeal of the Back Pay Act by Congress in the CSRA, the Court repealed its own judicial interpretation of an implied claim under the

---

[11] Oddly enough, Petitioners further proffer that ELL students could maintain an action against a district or school (not the state) but never explain how Congress intended such varying results. Of course, if the problem is systemic and begins at the state level, such an interpretation would provide no meaningful protection of the civil rights of ELL children.

Back Pay Act for certain civil servants. *Id.* at 453. Here, the legislative history of NCLB provides no indication that its purpose was to address a haphazard arrangement or widespread abuse of administrative and judicial review processes under the EEOA nor was there an implied right of action created by the courts. As stated earlier, Congress made no mention of the EEOA.

The lone mention of the EEOA was indirectly through the NCLB's savings clause, which represented Congress' intent to *preserve* civil rights protections under the EEOA. Similar savings clauses in statutes have been recognized as evidence of Congress' intent to preserve actions in other statutes. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 383 (1983) (holding that the savings clauses in the 1933 Securities Act and the 1934 Securities Exchange Act confirmed that the remedies in each Act were to be supplemented by "any and all" additional remedies); *see also Pennsylvania R.R. v. Sonman Coal Co.*, 242 U.S. 120, 123-124 (1916) (holding that, "a manifest purpose of [a savings clause] is to make it plain that such appropriate common law and statutory remedies as can be enforced consistently with the scheme and purpose of the act are not abrogated or replaced") (internal quotation omitted).

Adopting Petitioners' argument here could lead to countless similar preclusion defenses to other civil rights lawsuits filed to protect the rights of students to equal educational opportunities, including special education and minority students who are "covered"

under the NCLB. To the contrary, the Court has consistently found that civil rights statutes touching upon the same or similar subject can co-exist. *Fitzgerald*, 129 S. Ct. at 788 (unanimous opinion holding that Title IX does not preclude § 1983 actions alleging unconstitutional gender discrimination); *see also Herman & MacLean v. Huddleston*, 459 U.S. 375, 383 (1983).

II. Petitioners Overstate the Operation and Remedial Scheme of NCLB

Petitioners acknowledge that Section 1703(f) of the EEOA remains a viable, individual rights securing statute, although they maintain that the thrust of the statute does not reach to Arizona's school funding plans.[12] Nonetheless, they also argue that the application of Section 1703(f) rests on one question: Whether Arizona receives federal funding under the NCLB. That question grossly overstates the operation of NCLB itself. Although NCLB has a number of complex provisions and seeks to hold states accountable for the expenditure of federal funds, it is not the all-encompassing, comprehensive remedial scheme meant

---

[12] Petitioner Horne: "The Superintendent never claimed that NCLB negated the EEOA." Superintendent's Br. 59. Petitioner Speaker of the House: "Moreover, situations may well arise where, although a State is in compliance with NCLB's mandates, particular schools or school districts engage in individual instances of discrimination for which a court-ordered remedy under the EEOA is 'essential' to correct a 'particular denial [ ] of equal educational opportunity.'" Legislators' Br. 60.

to replace the EEOA as described by Petitioners. As indicated further below, NCLB's coverage is quite limited and inconsistent. Congress could not have intended that NCLB would repeal the ability to bring EEOA actions against states under a system where hundreds of thousands of ELL students nationally are simply not counted for NCLB's purposes.

A. NCLB is Subject to Re-authorization

As pointed out above, courts have sensibly interpreted Section 1703(f) for 35 years. During that time there have been numerous iterations of the ESEA, including the changes to the Act's provisions that pertain to ELL students. While some courts, including the court of appeals in the seminal *Castaneda* case, have consulted those provisions to determine the scope of Section 1703(f), no court has stated that it could not weigh evidence of whether language programs of any nature were being implemented by trained teachers with access to materials for ELL students under the monitoring authority of the state and local education agencies ("LEAs"). In now urging that judicial inquiry end with "NCLB compliance," Petitioners confront an initial dilemma. Congressional authorization for funding NCLB has expired.[13] How and whether the Act will be extended is

---

[13] The Act was funded for the Fiscal Year 2002 through Fiscal Year 2007. The funding was automatically extended through September 30, 2008, pursuant to 20 U.S.C. § 1226(a).

not known.[14] Yet Petitioners urge that § 1703(f) be conflated with NCLB even in the face of NCLB's uncertain future. This Court should summarily reject Petitioners' argument.

B. Petitioners Concede Various Aspects of "Appropriate Action" Under the EEOA Were Neither Required by NCLB Nor Approved by the USDOE

Petitioners implicitly acknowledge that the "appropriate action" requirement of Section 1703(f) requires states to do more than comply with NCLB. For example, Superintendent Horne states: "In this case, 'appropriate action' has been taken by improving ELL programming, hiring ELL qualified teachers, and reducing class sizes." (Superintendent's Br. 4). These examples of "appropriate action" taken by Arizona are not challenged by *amici*. Although they are not inconsistent with the goals of NCLB, it is

---

[14] The Court can take note that the future is, at least, unknown. One of the original authors of NCLB has noted: "In the five years since its passage, however, NCLB has produced both strong support and vociferous criticism . . . Some have even called for the act's repeal." Sen. Edward M. Kennedy, *Foreword*, Winter 2006 Issue, Harv. Educ. Rev. (2006), *available at* http://www.hepg.org/document/9/; Goldwater Institute, *Opting Out of No Child Left Behind* (2008); The Heritage Foundation, *Reforming No Child Left Behind by Allowing States to Opt Out: An A-Plus for Federalism* (2007); Arizona Republic, *An uncertain future for 'No Child Left Behind'* (2009), *available at* http://www.azcentral.com/arizonarepublic/local/articles/2009/01/25/20090125ednochild01.

instructive that these "appropriate actions" are not required by NCLB, which does not speak to monitoring, reducing class size or ELL teacher endorsements.[15]

C. In Contrast to the EEOA, NCLB Does not Address Equal Opportunity for All Parts of an Educational Program

Despite ambitious language about closing the academic achievement gap (*see* 20 U.S.C. § 6812(1)), NCLB only holds schools accountable for improving math and ELA. *See* 20 U.S.C. § 6311(b)(2)-(3).[16] By contrast, the EEOA mandates that states ensure that ELL students are provided with equal access to all "instructional programs" offered by an LEA (20 U.S.C. § 1703(f)), which by definition encompass

---

[15] The Superintendent's statement that: "Many of these steps were approved by the federal government and none of them existed before 2000" should not be taken to infer that these actions by Arizona were required by NCLB. In fact, a close examination of the nine transcript citations that accompany the statement reveals that few are examples of the federal government approving Arizona's measures. Superintendent's Br. 18 referencing Tr. Day 1, pp. 36, 43, 45, 47, 50, 55, 65, 70, 158.

[16] The Act also requires testing in science beginning in 2007-08 (20 U.S.C. § 6311(b)(3)(C)(v)(II)), but states, districts, and schools are not held accountable for students' progress in science as no specific "Annual Measurable Objective[s]" need be set as with English and math. (20 U.S.C. § 6311(b)(1)(G); 34 C.F.R. § 200.20).

many subjects and programs beyond math and English.

NCLB's definition of "core academic subjects," while not exhaustive, illustrates the type of "instructional program" to which ELL students are entitled, defining "core academic subjects" as English, reading/language arts, math, science, foreign languages, civics and government, economics, arts, history, and geography. 20 U.S.C. § 7801(11); 34 C.F.R. § 200.55(c). Where an LEA offers these "core academic subjects" within its "instructional programs," under the EEOA, it must also provide ELL students with equal access to this academic content. *See Castaneda*, 648 F.2d at 1011 (§ 1703(f) requires schools to "design programs which are reasonably calculated to enable [LEP] students to attain parity of participation"). Under NCLB, with its focus on English and math, a state or LEA may meet its NCLB goals for ELL students under Title I (AYP) and Title III (Annual Measurable Achievement Objectives, "AMAOs") and yet provide ELL students little or no instruction in other subjects.

D. The Accountability Provisions of NCLB Exclude Thousands of ELL Students

Central to NCLB's accountability provisions is the concept of AYP as determined by assessments of students, including ELL students. *See* 20 U.S.C. § 6311. A school that fails to make AYP for two consecutive years is identified as needing "school improvement"

under 20 U.S.C. § 6316. Although parents of students in such schools are provided with the option of transferring their students to another school in the district (*id.* at § 6316(b)(1)(E)(i)) and may select supplemental educational services if an identified school continues to lag after one year (*id.* at § 6316(b)(5)), insofar as Title III of NCLB is concerned, those options are not available to parents of ELL students where annual progress in learning English is not occurring but only to parents at those schools that do not meet AYP.[17] Since NCLB does not incorporate a private right of action,[18] these limited parental options of transferring to another school or possibly receiving supplemental services become the only way that some but not all parents of ELL students can attempt to mitigate the harm to their children of unequal education.

---

[17] The requirement that ELL students show progress toward learning English is different than that of the requirement to meet AYP in English/Language Arts. The first is measured by English language growth on a language proficiency test for ELL students. AYP in English is the requirement for meeting a state's proficiency standards in English/Language Arts that is required of all students, ELLs and non-ELLs alike. 20 U.S.C. §§ 6311(b)(2)(B), 6311(b)(7) & 6842(a)(3)(A). Additionally, not all approved supplemental service providers are required to be able to provide services to ELL students. *See* U.S. Dep't of Education, *Non-Regulatory Guidance, Supplemental Educational Services* 19-20 (2009), *available at* http://www.ed.gov/policy/elsec/guid/suppsvcsguid.pdf.

[18] Legislators' Br. 15.

1. NCLB's Provisions Exclude Large Numbers of ELL Students due to Grade Exclusion

NCLB's accountability provisions are focused on grades 3-8 and grades 10-12 – grades K, 1, 2, and 9 are not specifically considered.[19] For the 2007-2008 school year in Arizona, 88,524 ELL students were not considered because they are not within the grades specified for assessment under the NCLB. Collectively, these four grades accounted for approximately 50% of Arizona's ELL student population[20] and are not counted when it comes to the aforementioned parental options-generating provisions of NCLB.

In California, which educates almost one-third of all ELL students in the nation, students are tested for NCLB purposes in grades 2-8, and then again in grade 10.[21] In 2008, there were 584,977 ELL students in grades K, 1, 9, 11, and 12 in California left entirely

---

[19] Under 20 U.S.C. § 6311, the test scores of students at grades 3-8 and (at least once) in grades 10-12 are counted to determine whether schools will be identified for improvement – the precondition for the triggering of the two parental options of student transfer and supplemental services.

[20] Arizona Department of Education, Personal Communication to Roger Rice, Re: 00-ADE Data Request (Feb. 2, 2009).

[21] California Dep't of Educ., *2008 Adequate Yearly Progress Report Information Guide*, 7 (Nov. 2008), *available at* http://www.cde.ca.gov/ta/ac/ay/documents/infoguide08r.pdf.

outside NCLB's accountability framework due to grade exclusion.[22]

The fact that most high schools do not receive Title I funds at all underscores NCLB's limitations in reaching all students for accountability purposes. Title I funds are used predominantly at the elementary level. In 2004-05, for example, 71 percent of elementary schools received Title I allocations, compared with 40 percent of middle schools and 27 percent of high schools. Students in grades 10 through 12 accounted for 21 percent of all public school students but constitute only 9 percent of Title I participants.[23] As a result, NCLB's "system" fails to address the progress of thousands of secondary students – including those who are in greatest danger of dropping out of school.[24]

---

[22] Warren Institute, *Analysis of 2008 NCLB Accountability for ELL Students in California*, Table 5, *available at* http://www.law.berkeley.edu/3164.htm.

[23] U.S. Dep't of Education, *National Assessment of Title I Final Report*, xxi, 13 (2007). The accountability provisions of NCLB apply only to schools and districts that receive Title I funds. *See* 20 U.S.C. § 6311(b)(2)(A)(ii), limiting the requirements of § 6316 (which sets out the parental rights to transfer students and also to seek supplementary services) to Title I schools.

[24] According to the Arizona Department of Education, *Research and Evaluation Section* (Oct. 2008), the statewide dropout rate more than doubles between grade 8 and grade 9. A study of national data by researchers at Boston College found that: "the rate at which students disappear between grades 9

(Continued on following page)

2. When There are Fewer Than 40 Students in the ELL Group, Arizona ELL Students Are Excluded for Accountability Purposes

Under NCLB, student subgroups such as ELL students are not counted in AYP calculations when their number is too small. 20 U.S.C. § 6311(b)(2)(C)(v)(II). For instance, Arizona's specific minimum number, or "N" size, is 40 students[25] in any one subgroup (including ELLs), which was an increase from Arizona's prior "N" of 30.[26]

---

and 10 has *tripled* over the last 30 years." Walt Haney et al., *The Education Pipeline in the United States, 1970-2000*, 10 (2004).

[25] *State of Arizona Consolidated State Application Accountability Workbook*, 45 (Revised July 3, 2008, Final Submission).

[26] Thirty students was conventionally considered large enough to provide statistically meaningful results, but Arizona received permission from the Department of Education to raise the minimum number to 40. Arizona Department of Education, *Arizona's School Accountability System Technical Manual*, Vol. II, 19 (2004) *available at* http://azed.gov/azlearns/NCLB_Technical_Manual_2003.pdf; *Decision Letter on Request to Amend Arizona Accountability Plan*, Letter, Henry L. Johnson to Tom Horne (Sept. 15, 2005), *available at* http://www.ed.gov/print/admins/lead/account/letters/acaz3.html. The Commission of No Child Left Behind, a bipartisan group charged with providing recommendations to improve NCLB, suggests "N" sizes of no larger than 20 students to ensure accountability for all students. Commission on No Child Left Behind, *Beyond NCLB: Fulfilling the Promise to Our Nation's Children* (Washington, D.C.: The Aspen Institute, 2007). *See also* Erin Dillon & Andrew J. Rotherham, *State's Evidence: What It Means to Make 'Adequate Yearly Progress' Under NCLB*, Education Sector (2007).

The test scores of students below a minimum group size in a given LEA are not evaluated or reported as a separate subgroup, but rather are grouped with all student scores in the LEA and therefore may be masked by the achievement of other students. As a result, only those schools or school districts with the largest ELL student populations are held accountable for their academic achievement under NCLB.[27]

As another example, California includes ELLs as a subgroup in its calculations only if there are 100 or more ELLs enrolled at the school or there are 50 or more ELLs and they make up at least 15 percent of the tested population.[28] Thus, there were nearly 95,000 ELLs in schools in California which did not need to satisfy AYP for ELLs because the ELL population was deemed not numerically significant.[29]

---

[27] For example, a school with an "N" size of 30 "where 50 percent of the students in grades K-6 are [ELL] can nonetheless avoid having to have a [ELL] subgroup if there are only 29 [ELL] students in grades 3-6." Wayne E. Wright, Education Policy Study Laboratory, Language Policy Research Unit (LPRU), *Evolution of Federal Policy and Implications of No Child Left Behind for Language Minority Students* (Arizona State University) 42-43 (January 2005), *available at* http://epicpolicy.org/files/EPSL-0501-101-LPRU.pdf.

[28] Letter from U.S. Dep't of Educ. to California (Jan. 8, 2009), *available at* http://www.ed.gov/admins/lead/account/cornerstones/ca.pdf.

[29] Warren Institute, *Analysis of 2008 NCLB Accountability for ELL Students in California*, Table 3, *available at* http://www.law.berkeley.edu/3164.htm.

When ELLs in grades not counted for accountability are combined with those excluded due to lack of numerical significance, these two gaps in NCLB's accountability system left 679,521 ELLs in California – nearly half of all ELLs in the state, or one-sixth of all ELLs in the nation – beyond the reach of NCLB accountability mechanisms for ELLs. Even in the subset of California districts meeting NCLB accountability requirements with ELLs, there were 125,508 ELLs not covered by any ELL accountability mechanism by virtue either of grade exclusion or not meeting the state's numerical significance standard for subgroup accountability.[30]

This data demonstrates there are ELL students who attend schools or are in school districts in California that may have met AYP, but who, as a subgroup, may not be proficient under state standards and who may not be receiving appropriate language instruction.

In its Notice of Proposed Rulemaking issued in April 2008, the U.S. Department of Education stated that nearly 2 million students are not being counted in NCLB subgroup accountability determinations at the school level. Minority students are as much as seven times more likely than white students to have their scores excluded from school-level AYP subgroup calculations. 73 Fed. Reg. 22020, 22022 (Apr. 23, 2008).

---

[30] *Id.*, Tables 1, 3, 5.

3. Arizona's Application of a 99% Confidence Level Further Excludes ELL Students for Accountability Purposes

In addition to the minimum group size, states use confidence intervals in calculating AYP. This plus or minus zone or "window" gives schools and school districts leeway in the number of students that need to be proficient to meet AYP for a given year. According to the Congressional Research Service ("CRS"):

> Use of this technique (also) tends to have the effect, whether intentional or not, of substantially reducing the number of schools or ELLs identified as failing to meet AYP standards. Use of this statistical technique is not explicitly authorized by the NCLB, but its inclusion in the accountability plans of several states has been approved by ED.[31]

Under this procedure, the higher the confidence interval the larger the zone must be and the fewer students will need to score proficient to meet the AMAOs or AYP.[32] In Arizona, AYP determinations are

---

[31] Wayne C. Riddle, *CRS Report for Congress, Education for the Disadvantaged: Reauthorization Issues for ESEA Title I-A Under the No Child Left Behind Act*, 19 (2006).

[32] The Commission on No Child Left Behind recommends limiting confidence intervals to 95%. Commission on No Child Left Behind, *Beyond NCLB: Fulfilling the Promise to Our Nation's Children* (Washington, D.C.: The Aspen Institute, 2007). *Also see*, Erin Dillon and Andrew J. Rotherham, *States'*

(Continued on following page)

based on a 99% confidence level and the Arizona Department of Education determines the confidence interval for the percent proficient for each subject and grade.[33]

Utah, like Arizona, uses a 99% confidence interval. In Utah, the proficiency objective for Language Arts for grades 3-8 is 65% proficient, and for mathematics at least 57% proficient. For a group of 25 students, the 99% confidence level would have the effect of reducing the required number of proficient students under AMAO for math from 15 (57% of 25) to 8 proficient students.[34] The same critique applies to Arizona and other states as well.

Evidence: What It Means to Make 'Adequate Yearly Progress' Under NCLB, Education Sector (July 2007).

[33] *See* Arizona Department of Education, *Arizona's School Accountability System 2006, Technical Manual, Volume II: Adequate Yearly Progress*, DE 12 (2007).

[34] David Rogosa, *Statistical Misunderstandings of the Properties of School Scores and School Accountability*, in *Yearbook of the National Society for the Study of Education*, Vol. 104, 165-6 (2005). *See also* David Rogosa, *The NCLB "99% confidence" scam: Utah-style calculations*, Stanford University (November 2003) *available at* http://www-stat.stanford.edu/~rag/nclb/utahNCLB.pdf.

4. The Meaning of "Making Adequate Yearly Progress" Does not Necessarily Equate to Success for all ELL Students

The number of ELL students' scores potentially considered for accountability purposes under 20 U.S.C. §§ 6311 and 6316 is considerably diminished (1) after grades K-2 and 9 are excluded, (2) by not counting the ELL subgroup members where there are fewer than 40 in a cohort, and (3) by application of the confidence interval procedure. The remaining pool of ELLs for determining AYP is then measured against the annual progress as set by the State.[35]

Arizona's Annual Proficiency Goals for School Years 2005-2007							
Grade	**3**	**4**	**5**	**6**	**7**	**8**	**High School**
Math	43.3%	54%	33.3%	43%	48%	22.5%	25%
Reading	53.3%	45%	43.3%	45%	49%	42.5%	35.8%

[35] Petitioner Horne is incorrect in stating that: "NCLB also sets certain minimum targets so that specified percentages of . . . ELL students must . . . achieve success academically (AYP) on Arizona's AIMS tests." (Superintendent's Br. 18). As the State's witness testified at trial, it is the Arizona Department of Education that sets improvement percentages for ELL students, not NCLB. *See* Tr. Day 1, p. 160. *See also,* Ellen Forte Fast & William J. Erpenback, *Revisiting Statewide Educational Accountability Under NCLB, Council of Chief State School Officers,* 21 (2004) ("The Act leaves it to states to determine the level of performance that reflects adequate preparation or proficiency.").

As the table above demonstrates, schools in Arizona meet their annual proficiency standards under NCLB even when approximately between 50 and 75% of their students are *not* proficient in math or Reading.[36]

The low rate of annual proficiency set forth by Arizona for those ELL students actually subject to NCLB's provisions is further watered down for accountability purposes through application of additional devices, thus further distancing NCLB from the purposes of the EEOA. Under 20 U.S.C. § 6311(b)(I), if a sub-group such as ELL students does not meet the State's academic achievement objectives in any year, their school will still be considered to have met its annual progress standard if the percentage of those proficient increased by 10% from the preceding year. So, for example, if only 20% of ELLs meet the proficiency standards in any given year, a school will still meet its AYP requirement if only 22% of ELLs meet academic proficiency in the following year, an increase of 10%.

Furthermore, school districts can only be determined to need "improvement" if they fail to make AYP in the same subject for two consecutive years in both elementary/middle school and high school.[37] If high

---

[36] *State of Arizona Consolidated State Application Accountability Workbook*, 31 (July 3, 2008).

[37] *See, Decision Letter on Request to Amend Arizona Accountability Plan, supra* at n.26. As one commentator has described the practice: "A district could fail two-thirds of its

(Continued on following page)

school ELLs fail to master math, for example, there is no district failure so long as elementary school students meet the math AYP criterion. Similarly, if elementary school ELLs fail to meet the State's academic objectives in Reading in year one, meet the objective in Reading in year two, but fail to meet the math objective, annual progress will be considered to have been met because the failure was not in the same subject for two consecutive years.

5. Not all School Districts with ELL Students Participate in Title III Funded Programs

All school districts are expected to serve their ELL students, but not all districts are eligible for Title III funding. Under 20 U.S.C. § 6824(b), a State education agency shall not award a sub-grant to a school district in an amount less than $10,000. States have discretion in determining how to implement this provision. In Massachusetts, for example, Title III funds are distributed to school districts enrolling 100 or more ELL students. In FY2007, this meant that 56 out of 251 school districts with ELL students

---

students every year and never be held accountable, as long as it wasn't exactly the *same* two-thirds." Kevin Carey, *The Pangloss Index: How States Game the No Child Left Behind Act*, 10 (Nov. 2007), *available at* http://www.educationsector.org/usr_doc/The_Pangloss_Index.pdf.

were eligible for Title III allocations.[38] In New York State for the 2006-2007 school year, 271 school districts were eligible for Title III funding for their ELL students but 628 school districts with ELL students were not directly eligible.[39]

E. Many ELLs Who are Failing to Demonstrate Proficiency on State Assessments are in Districts and Schools Satisfying all the Accountability Requirements of NCLB

There are hundreds of thousands of ELL students failing to meet their state-mandated proficiency rates in school districts that are meeting all of NCLB's ELL accountability requirements. A research study in California found that a majority of ELL students (140,243) who attend school in California's NCLB-compliant districts did not score "proficient" on the English/Language Arts assessment.

---

[38] Mass. Dept. of Elementary and Secondary Education, *No Child Left Behind Title III: Language Instruction for Limited English Proficient & Immigrant Students Program*, *available at* http://www.doe.mass.edu/ell/titleIII.html (last visited Mar. 23, 2009).

[39] New York State Education Department, *No Child Left Behind Allocations for Title III, Part A For New York State Public School Districts and Charter Schools* 2006-2007 (Dec. 5, 2006), *available at* http://www.emsc.nysed.gov/funding/cladcep/0607/titleIIIallocs0607rev8-9-06.htm.

School-level data reveals even more starkly the differences between meeting accountability requirements under NCLB and learning academic English. In California, among schools that made AYP in 2008, there were 209,012 ELLs – approximately 1 in 8 ELLs in the state – who were not proficient in ELA (58%) and 164,748 (46%) not proficient in math.[40] *Amici* do not suggest that failing to achieve proficiency *per se* constitutes an EEOA violation when states and districts are otherwise taking appropriate action under the EEOA. Rather, as the data suggest, even ELLs in districts and schools meeting NCLB accountability properly retain the right to question whether their educational agencies are taking appropriate action as to them.

III. Petitioners' Interpretation of the EEOA Would Embroil the Court in Oversight of NCLB

The history of cases involving Section 1703(f) of the EEOA show that courts have been able to balance the requirement that states and local school districts take "appropriate action to overcome language barriers" with deference to the role of local government in educational policy setting. In urging that this standard now

---

[40] Warren Institute, *Analysis of 2008 NCLB Accountability for ELL Students in California*, Tables 2, 4, *available at* http://www.law.berkeley.edu/3164.htm. Nearly 18% of ELLs in these "successful" schools were not counted as part of an ELL subgroup. *Id.*, Table 3.

be merged with NCLB, Petitioners are inviting an expansive new realm of judicial involvement in public education.

If the measure of "appropriate action" under the EEOA is to be gauged by whether a state or school district is "in compliance" with NCLB, inevitably the question will turn to how "compliance" is to be determined. That, in turn, raises the question whether the U.S. Department of Education's multiple interpretations and exceptions in the administration of NCLB are themselves "appropriate actions" faithful to the EEOA statute. Academic commentators who have carefully tracked how NCLB has been implemented have noted that: "what once seemed a clear if highly controversial policy has now become a set of bargains and treaties with various states."[41] Put another way, the facile notion of "compliance with NCLB" can mean different things in different states.

For example, Arizona has increased its "N" size and confidence intervals under NCLB, as well as loosened its definition of school districts requiring improvement, identifying only those districts when they did not make AYP in the same subject in both elementary/middle and high school grade spans for two consecutive years. The implications of these

---

[41] Gail L. Sunderman, *The Unraveling of No Child Left Behind: How Negotiated Changes Transform The Law*, The Civil Rights Project, Harvard University 6 (February 2006). As a result "accountability no longer has a common meaning across states or even within states." *Id.* at 10.

changes are profound and, whatever their intent, serve to reduce the number of students counted and schools identifiable for "accountability" purposes.[42]

Amici are not taking a position as to whether these particular revisions and amendments are appropriate or consistent with Congress' intent or the language of NCLB. Rather, *amici* point them out to indicate that whatever surface appeal conflating the EEOA with NCLB may have, the path implies much more, rather than much less, judicial oversight.

---

[42] *Decision Letter on Request to Amend Arizona Accountability Plan*, *supra* at n.26. *See* other Arizona letters requesting amendments in 2004, *available at* http://www.ed.gov/print/admins/lead/account/letters/acaz2.html, and http://www.ed.gov/print/admins/lead/account/letters/acaz4.html, (2006), http://www.ed.gov/print/admins/lead/account/letters/acaz5.html (2007), and http://www.ed.gov/print/admins/lead/account.letters/acaz6.html (2008).

CONCLUSION

For the above reasons, *amici* respectfully ask that the Court affirm the decision below.

Respectfully submitted,

NINA PERALES
Counsel of Record
DAVID G. HINOJOSA
MEXICAN AMERICAN
LEGAL DEFENSE AND
EDUCATIONAL FUND
110 Broadway St., Suite 300
San Antonio, TX 78205
(210) 224-5476

CESAR A. PERALES
JOSE PEREZ
DIANA SEN
LATINOJUSTICE PRLDEF
99 Hudson Street, 14th Floor
New York, NY 10013
(212) 219-3360

JOHN T. AFFELDT
TARA KINI
PUBLIC ADVOCATES, INC.
131 Steuart Street, Suite 300
San Francisco, CA 94105
(415) 431-7430

ROGER L. RICE
JANE E. LÓPEZ
MULTICULTURAL EDUCATION,
TRAINING & ADVOCACY,
(META Inc.)
240A Elm St., Suite 22
Somerville, MA 02144
(617) 628-2226

DANIEL R. ALONSO
STEWART WALLACE
MICHAEL DENVIR
KAYE SCHOLER LLP
425 Park Avenue
New York, NY 10022
(212) 836-8000

Attorneys for Amici

March 25, 2009

STATEMENT OF INTERESTS

The Earl Warren Institute on Race, Ethnicity & Diversity

The Earl Warren Institute on Race, Ethnicity & Diversity (Warren Institute) at the University of California, Berkeley is a national, multidisciplinary research, policy analysis and public education venture that engages challenging topics in civil rights, equal opportunity, race and ethnicity in America to provide valuable intellectual capital to public and private sector leaders, the media and the general public, while advancing scholarly understanding. Central to its methods are concerted efforts to build bridges connecting the world of research with the world of civic action and policy debate so that each informs the other, while preserving the independence, quality and credibility of the academic enterprise. The Warren Institute devotes significant attention to education issues, including promoting college-ready K-12 education for all, increasing access to quality education for immigrant children, improving system performance, and promoting institutional accountability for student success.

Education Law Center

Education Law Center (ELC) is a non-profit organization in Newark, New Jersey established in 1973 to advocate on behalf of public school children for access to an equal and quality education under state and federal laws. ELC represents the plaintiff school children in the *Abbott v. Burke* litigation and

continues to advocate on their behalf to ensure effective and timely implementation of the educational programs and reforms ordered by the New Jersey Supreme Court. Because of its nationwide expertise in school finance, preschool, facilities, and other areas of education law and policy, ELC established EducationJustice, a national program, to advance equitable educational opportunity and narrow achievement gaps. EducationJustice and ELC work to improve opportunities for low-income students, students learning English, and students with disabilities through policy initiatives, research, public education, and legal action, in states across the nation. EducationJustice has participated as *amicus curiae* in quality education cases in the state courts of Colorado, Connecticut, Indiana, Missouri, Oregon, and South Carolina.

LatinoJustice PRLDEF

LatinoJustice PRLDEF (formerly known as the Puerto Rican Legal Defense and Education Fund) was founded in New York City in 1972. Our continuing mission is to protect the civil rights of all Latinos and to promote justice for the pan-Latino community. Since our founding 36 years ago, we have become a major national civil rights organization litigating impact cases, primarily across the Eastern United States. In our first lawsuit, *Aspira v. New York City Board of Education*, we helped establish bilingual education in New York. We have combated the forced segregation of Latino children in Delaware, Connecticut and Massachusetts. In addition to creating pathways

for success for Spanish-speaking children in public schools, we have fought discriminatory hiring policies for civil service jobs, provided equal access to public housing for Latinos, secured the provision of public services in Spanish, and protected the constitutional rights of migrant workers. LatinoJustice PRLDEF has argued landmark civil rights cases that have had profound implications for all Latinos.

Mexican American Legal Defense and Educational Fund (MALDEF)

MALDEF is a national nonprofit organization established in 1968 to protect the civil rights of Latinos living in the United States. MALDEF secures the civil rights of Latinos through litigation, advocacy and education. MALDEF has represented Latino interests in many important language rights and other educational rights cases in Texas, California, Colorado, New Mexico, Arizona and other states, including the landmark case, *Plyler v. Doe*. MALDEF's mission includes a commitment to pursuing equal educational opportunities for Latino students, including the opportunity to become academically proficient in English and participate in parity with other students in educational programs, and therefore MALDEF has a strong interest in the outcome of this case.

Multicultural Education, Training & Advocacy, (META) Inc.,

Multicultural Education, Training & Advocacy, (META) Inc., is a national nonprofit organization formed in 1983 for the exclusive purpose of protecting the rights of language minority and poor children to equal educational opportunities in schools across the nation. META has pursued litigation, policy analysis, and community education, on behalf of such children in Massachusetts, New York, Florida, Texas, Colorado, California, New Mexico, and elsewhere. META knows firsthand what it means for these vulnerable student populations to go without appropriate education including the lack of trained teachers, curricula, and materials that are part of appropriate or equal education for any child. META is filing this brief because of the dangerous arguments advanced by Petitioners' case that seek to undo decades of sensible civil rights litigation in favor of reliance on an overstated and misunderstood federal funding statute that in no way allows the parents of English language learner students to protect their children's rights or future.

Public Advocates, Inc.

Public Advocates, Inc. is a non-profit, public interest law firm and one of the oldest public interest law firms in the nation. Public Advocates uses diverse litigation and non-litigative strategies to handle exclusively policy and impact cases that challenge the

persistent, underlying causes and effects of poverty and discrimination. Since its founding in 1971, a major focus of Public Advocates' work has been advocacy to advance equal educational opportunities for low-income students, students of color, and English Learners. Public Advocates was one of the lead counsel in *Williams v. State of California*, a statewide class action lawsuit challenging the state's failure to provide all students with basic educational resources: qualified teachers, textbooks, and decent school facilities. The *Williams* Settlement established, *inter alia*, robust systems for monitoring and enforcing EL students' rights to qualified teachers with specialized training in how to teach them and adequate instructional materials.

AMICUS CURIAE BRIEF

121

(12) (15)

Supreme Court, U.S.
FILED
FEB 25 2009
OFFICE OF THE CLERK

Nos. 08-289 and 08-294 (Consolidated)

IN THE

Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF ARIZONA,

and

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES, *ET AL.*,

Petitioners,

v.

MIRIAM FLORES, *ET AL.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF PETITIONERS

LAWRENCE J. JOSEPH
1250 CONN. AVE, NW
SUITE 200
WASHINGTON, DC 20036
(202) 669-5135

ANDREW L. SCHLAFLY
Counsel of Record
939 OLD CHESTER ROAD
FAR HILLS, NJ 07931
(908) 719-8608

Counsel for Amicus

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

BOTH 4CVTN7

86417 e .46.

QUESTIONS PRESENTED

In 2000, a federal district court held that Arizona violated the Equal Educational Opportunity Act ("EEOA") because it was not adequately funding programs for teaching English to students. Since then, Arizona has implemented enormous funding increases and complied with the comprehensive federal requirements for English-language instruction under the No Child Left Behind Act ("NCLB"). The district court has nonetheless refused to modify its eight-year-old injunction, imposing multi-million dollar penalties on the State until the Arizona Legislature further (and substantially) increases funding. Applying a standard that conflicts with decisions of this Court and the other courts of appeals, the Ninth Circuit affirmed, holding that Petitioners were not entitled to relief because (i) the named defendants support the injunction, and (ii) the injunction's "basic premises" have not been "swept away."

The questions presented by these two consolidated cases are:

1. Whether a federal-court injunction seeking to compel institutional reform should be modified in the public interest when the original judgment could not have been issued on the state of facts and law that now exist, even if the named defendants support the injunction (No. 08-294)?

2. Whether compliance with NCLB's extensive requirements for English language instruction is sufficient to satisfy the EEOA's mandate that States take "appropriate action" to overcome language

barriers impeding students' access to equal educational opportunities (No. 08-294)?

3. By mandating that the State of Arizona provide for a minimum amount of earmarked funding specifically allocated for English Language Learner programs statewide to comply with the "appropriate action" requirement of EEOA §1703(f), did the Ninth Circuit violate the doctrine prohibiting federal courts from usurping the discretionary power of state legislatures to determine how to appropriately manage and fund their public education systems (No. 08-289)?

4. Should the phrase "appropriate action" as used in EEOA §1703(f) be interpreted consistently with NCLB, where both Acts have the same purpose with respect to English Language Learners and the NCLB provides specific standards for the implementation of adequate English Language Learner programs, but the EEOA does not (No. 08-289)?

Questions 2 and 4 cover the same interplay between EEOA and NCLB, and Eagle Forum ELDF answers them together in Section IV. Questions 1 and 3 cover related issues of federalism in litigation of this type, and Eagle Forum ELDF answers them in Sections II and III, respectively. At the outset, Eagle Forum ELDF addresses the damage that bilingual education inflicts on its intended beneficiaries and the nation as a whole.

TABLE OF CONTENTS

Pages

Questions Presented i
Table of Contents iii
Table of Authorities iv
Interest of *Amicus Curiae* 1
Factual Background 2
Statutory Background 3
Summary of Argument 5
Argument 6
I. Bilingual Education Divides the Nation and Injures Students 6
A. Bilingual Education Balkanizes Our Nation 7
B. Bilingual Education Disenfranchises the Students Subjected to It 13
C. Courts Lack Authority to Require Education in Languages Other than English 18
II. Courts Must Alter Institutional-Reform Injunctions Unsupported by Current Facts and Law 20
III. The Lower Courts Usurped the State and Local Governments' Roles of Determining How to Manage and Fund Public Education 22
IV. Courts Must Read EEOA's "Appropriate Action" Consistently with Other Federal Legislation ... 24
A. Without Governing Principles, EEOA's Appropriate Action Is Non-Justiciable 25
B. NCLB Provides Governing Principles 29
C. Pre-NCLB Laws Provided Governing Principles 31
Conclusion 35

TABLE OF AUTHORITIES

Pages

Cases

Alexander v. Sandoval, 532 U.S. 275 (2001) 2

American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) 32

Board of Educ. of Oklahoma City Public Schools v. Dowell, 498 U.S. 237 (1991) 21

Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981) 28

Chrysler Corp. v. Brown, 441 U.S. 281 (1979) 24

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 27

City of Canton, Ohio v. Harris, 489 U.S. 378 (1989) 27-28

DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006) 25

Dayton Bd. of Ed. v. Brinkman, 433 U.S. 406 (1977) 22

Erlenbaugh v. U.S., 409 U.S. 239 (1972) 34

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 34

Frew v. Hawkins, 540 U.S. 431 (2004) 21

Gomez v. Illinois State Board of Education, 811 F.2d 1030 (7th Cir. 1987) 28

Gray v. Powell, 314 U.S. 402 (1941) 27

Heckler v. Chaney, 470 U.S. 821 (1985) 27

Jett v. Dallas Independent School Dist., 491 U.S. 701 (1989) 35

Lau v. Nichols, 414 U.S. 563 (1974) 8
Luther v. Borden, 48 U.S. 1 (1849) 26
Missouri v. Jenkins, 515 U.S. 70 (1995) 23
Morton v. Mancari, 417 U.S. 535 (1974) 30, 32, 35
Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55 (2004) 28
Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986) 31-32
Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309 (1958) 27
People v. Superior Court, 92 P.R.R. 580 (1965) 9
Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) .. 29
Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992) 21
Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) 25-26
U.S. v. Estate of Romani, 523 U.S. 517 (1998) 34
U.S. v. Fausto, 484 U.S. 439 (1988) 34
U.S. v. Heirs of Boisdoré, 49 U.S. (8 How.) 113 (1849) 31
Vieth v. Jubelirer, 541 U.S. 267 (2004) 26

Statutes

Administrative Procedure Act, 5 U.S.C. §§551-706 27
5 U.S.C. §706(1) 28
8 U.S.C. §1423(a)(1) 12-13
8 U.S.C. §1423(b) 13
Equal Educational Opportunities Act, 20 U.S.C. §§1701-1721 ..... *passim*

20 U.S.C. §1703(f) ..... ii, 3, 26, 28, 31
20 U.S.C. §1706 4
20 U.S.C. §1712 ..... 4, 24, 28, 35
20 U.S.C. §6812(2) 4
20 U.S.C. §6845 29
20 U.S.C. §6845(2) 5, 29, 30, 35
20 U.S.C. §6847 ..... 5, 29
48 U.S.C. §864 7
Education Amendments of 1974 PUB. L. NO. 93-380, 88 Stat. 88 Stat. 484 (1984) 31
Bilingual Education Act, PUB. L. NO. 93-380, §105(a)(1), 88 Stat. 484, 503-12 (1984) 4, 31-34
Equal Educational Opportunities Act of 1974, PUB. L. NO. 93-380, §§201-259, 88 Stat. 484, 514-21 (1984) 3
PUB. L. NO. 98-511, §201, 98 Stat. 2366, 2369-87 (1984) 4
PUB. L. NO. 98-511, §201(a) , 98 Stat. 2366, 2370-71 (1984) 33
PUB. L. NO. 100-297, §1001, 102 Stat. 130, 274-93 (1988) 4
PUB. L. NO. 100-297, §7002(a), 102 Stat. 130, 275 (1988) 33
PUB. L. NO. 103-382, §7112, 108 Stat 3518, 3719-20 (1994) 33
No Child Left Behind Act of 2001, PUB. L. NO. 107-110, 115 Stat. 1425 (2002) ..... i-ii, 3-6, 24-35
English Language Acquisition, Language Enhancement, and Academic Achievement

Act, PUB. L. NO. 107-110, §301, 115 Stat. 1425, 1689-1734 (2002) 4, 29

Legislative History

118 CONG. REC. 8931 (1972) 2-3, 24

H.R. REP. NO. 98-748, *reprinted in* 1984 U.S.C.C.A.N. 4036 33

S. REP. NO. 100-222, *reprinted in* 1988 U.S.C.C.A.N. 101 33

132 CONG. REC. H1709 (daily ed. Apr. 9, 1986) (Statement of Rep. Jeffords) 33-34

142 CONG. REC. H9741 (daily ed. Aug. 1, 1996) (statement by Rep. Goodlatte) 9

Rules, Regulations and Orders

S. Ct. Rule 37.6 1

FED. R. CIV. P. 60(b)(5) 5, 20, 21

Other Authorities

Aeronautics Committee of New York City's Bar Association Seeks to Raise the Bar on Safety, 12 AIR SAFETY WEEK (Aug. 17, 1998) 17

ROY A. BASLER, COLLECTED WORKS OF ABRAHAM LINCOLN (1953-55) 6, 11-12

GABOR S. BORITT, LINCOLN AND THE ECONOMICS OF THE AMERICAN DREAM (1994) 11

Winston Churchill, Speech at Harvard University (Sept. 5, 1943) 7

Court ruling dashed hopes for an impartial recount; 1995 referendum ballots are history, THE GAZETTE (MONTREAL) A1 (Jul. 16, 2008) . 9-10

Francois Crepeau, *The Law of Quebec's Secession*, 27 AMERICAN REVIEW OF CANADIAN STUDIES (Sept. 1997) 10-11

Kenneth Culp Davis, *"Nonreviewable Administrative Action,"* 96 U. PA. L. REV. 749 (1948)... 27

Fiona Fleck, *Swiss Want English as Second Language,* LONDON TELEGRAPH (Oct. 29, 2000). 16

Toby Helm, *English is Language of Today, Germans Admit,* LONDON TELEGRAPH (Apr. 6, 2000) 15

William Langewiesche, *The Lessons of ValuJet 592,* 281 ATLANTIC MONTHLY No. 3, 81 (Mar. 1998) 17-18

DAVID G. MANDELBAUM (ed.), SELECTED WRITINGS IN LANGUAGE, CULTURE AND PERSONALITY BY EDWARD SAPIR (1949) 19-20

Paul J. Mishkin, *Federal Courts as State Reformers,* 35 WASH. & LEE L. REV. 949 (1978). 23

Notes from Parliament Hill, THE TORONTO STAR A23 (Dec. 4, 2008) 10

Andrew Osborn, *As if Things Weren't Bad Enough, Russian Professor Predicts End of U.S.,* WALL STREET JOURNAL, A1 (Dec. 29, 2008) 12

Gregory Rabassa, No Two Snowflakes are Alike: Translation as Metaphor, *reprinted in* JOHN BIGUENET AND RAINER SCHULTE, THE CRAFT OF TRANSLATION (1989) 19

Report of the Secretary of Civil Aviation, Spain (Oct. 1978), *reprinted in* AIRCRAFT ACCIDENT DIGEST (ICAO Circular 153-AN/56, 22-68) 18

THEODORE ROOSEVELT, "*The Children of the Crucible*," 14 ANNALS OF AMERICA 1916-1928, 129 (1968) 6

Springs Senator Bashes Plan for Spanish Ads, THE DENVER POST, B-02 (Jan. 27, 2009) 12

GEORGE STEINER, AFTER BABEL: ASPECTS OF LANGUAGE AND TRANSLATION (3d ed. 1998) 19

MIGUEL DE UNAMUNO, THE TRAGIC SENSE OF LIFE, AUTHOR'S PREFACE, (J.E. Crawford Flitch transl. 1921) 13-14

Barbara Wallraff, *What Global Language?* 286 ATLANTIC MONTHLY No. 5, 52 (Nov. 2000) 17

James Wilson, Summation Address to the Pennsylvania Ratifying Convention (Dec. 11, 1787), *reprinted in* THE DEBATE ON THE CONSTITUTION – FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION (Gryphon Eds. 1993) 14-15

Nos. 08-289 and 08-294 (Consolidated)

IN THE

Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF ARIZONA,

and

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES, *ET AL.*,

Petitioners,

v.

MIRIAM FLORES, *ET AL.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("Eagle Forum ELDF")[1] is a

[1] Eagle Forum ELDF files this *amicus* brief with the written consent of all parties; the written letters of consent from all petitioners and respondents have been lodged with the Clerk of the Court. Pursuant to this Court's Rule 37.6, counsel for

(Footnote cont'd on next page)

nonprofit organization founded in 1981 and headquartered in Saint Louis, Missouri. For more than twenty-five years it has defended American sovereignty and promoted adherence to the U.S. Constitution. Eagle Forum ELDF has repeatedly opposed unlawful behavior, including illegal entry into and residence in the United States, and encouraged State and local autonomy in the area of education. Eagle Forum ELDF has also long defended federalism, including the ability of state and local governments to protect their communities and maintain order. Eagle Forum ELDF's frequent participation as *amicus curiae* in appellate litigation involving immigration and English language issues, including *Alexander v. Sandoval,* 532 U.S. 275 (2001), in this Court, bears witness to its underlying interest in this Nation's immigration and education policies. For all of the foregoing reasons, Eagle Forum ELDF has a direct and vital interest in the issues presented before this Court.

FACTUAL BACKGROUND

Eagle Forum ELDF adopts the facts as stated by the petitioners. See Legislative Petitioners' Br. at 16-30; Superintendent's Br. at 2-30. In summary, after the district court found EEOA violations, the people

---

(Footnote cont'd from previous page.)

amicus curiae authored this brief in whole, and no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, and its counsel make a monetary contribution to the preparation or submission of this brief.

of Arizona enacted Proposition 203 to require public instruction in English, with "English Language Learner" or "ELL" students educated in separate, structured immersion classes until they achieve English proficiency. In addition, Arizona and its local schools took efforts to comply with NCLB, enacted in 2002. At the Nogales schools that provided the basis for this litigation, in conjunction with adopting English immersion for ELLs and complying with NCLB, school officials improved the teaching staff, replaced ineffective teacher aides with higher-quality teachers, reduced class sizes, improved facilities, improved textbook supplies, and ended social promotion. In response to these efforts, the Nogales schools' scores improved to the point where no ongoing EEOA violation exists.

STATUTORY BACKGROUND

Congress enacted the Equal Educational Opportunities Act of 1974 as part of the Education Amendments of 1974. PUB. L. NO. 93-380, §§201-259, 88 Stat. 484, 514-21 (1984). Although motivated in large part by the Nixon Administration and Congress' desire to limit federal desegregation decrees that imposed busing as a remedy, 118 CONG. REC. 8931 (1972) (President Nixon's transmittal message to Congress), EEOA also addressed the denial of equal educational opportunity on account of race or national origin through "the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." PUB. L. NO. 93-380, §204(f), 88 Stat. at 515 (codified at 20 U.S.C. §1703(f)). EEOA provides a

private right of action, 20 U.S.C. §1706, but limits the remedies available to those "***essential*** to correct particular denials of equal educational opportunity." 20 U.S.C. §1712 (emphasis added).

Enacted alongside EEOA in the Education Amendments of 1974 was the Bilingual Education Act, PUB. L. NO. 93-380, §105(a)(1), 88 Stat. 503-12, which reauthorized prior bilingual-education legislation. As explained in Section IV.C, *infra*, subsequent reauthorizations first opened the door to English immersion in 1984 with limited funding and then expanded that funding in 1988 in response to demands from the Nation's schools. PUB. L. NO. 98-511, §201, 98 Stat. 2366, 2369-87 (1984); PUB. L. NO. 100-297, §1001, 102 Stat. 130, 274-93 (1988).

Congress enacted NCLB in 2002, as part of an effort to enforce performance goals on schools. PUB. L. NO. 107-110, 115 Stat. 1425 (2002). With respect to bilingual education, NCLB's Title III, Part A – the English Language Acquisition, Language Enhancement, and Academic Achievement Act ("ELALEAAA") – re-codified the Bilingual Education Act, as amended and renamed. PUB. L. NO. 107-110, §301, 115 Stat. at 1689-1734. With respect to English education, ELALEAAA's purposes include "to assist all limited English proficient children, including immigrant children and youth, to achieve at high levels in the core academic subjects so that those children can meet the same challenging State academic content and student academic achievement standards as all children are expected to meet." 20 U.S.C. §6812(2). Finally, ELALEAAA's savings clauses provide *inter alia* that nothing in that

legislation either "require[s] a State or a local educational agency to establish, continue, or eliminate any particular type of instructional program for limited English proficient children," or "shall be construed in a manner inconsistent with any Federal law guaranteeing a civil right." 20 U.S.C. §§6845(2), 6847.

SUMMARY OF ARGUMENT

Before addressing the questions presented by these consolidated cases, Eagle Forum ELDF respectfully submits that the urge to bestow bilingual services on language minorities disserves both the Nation and the minorities themselves (Section I). Against that background, this Court easily should find that – having satisfied EEOA with its English immersion program – Arizona is entitled to relief from the district court's injunction under Rule 60(b)(5), notwithstanding that Arizona did not implement the remedy that the district judge and Ninth Circuit might prefer (Section II). By exercising their political preferences over the law, the lower courts usurped State and local authority over education, well beyond both the expertise and the authority of the federal courts (Section III). Finally, while the petitioners are correct that NCLB compliance is *per se* EEOA compliance on English language instruction (Section IV.B), this Court should also consider that – in the absence of NCLB and other cabining federal legislation – EEOA's "appropriate action" requirement would be nonjusticiable and Arizona's compliance plans unreviewable (Section IV.A). Moreover, in addition to NCLB, prior federal statutory acceptance of English

immersion would support the appropriateness of Arizona's academic success, even if Congress had not enacted NCLB (Section IV.C).

ARGUMENT

I. BILINGUAL EDUCATION DIVIDES THE NATION AND INJURES STUDENTS

As Theodore Roosevelt famously observed:

> We must have but one flag. We must also have but one language. That must be the language of the Declaration of Independence, of Washington's Farewell address, of Lincoln's Gettysburg speech and second inaugural. We cannot tolerate any attempt to oppose or supplant the language and culture that has come down to us from the builders of this Republic.

THEODORE ROOSEVELT, "*The Children of the Crucible,*" 14 ANNALS OF AMERICA 1916-1928, 129, at 130 (1968).

When language divides, culture itself divides, and a division of political systems cannot be far behind. In many states, a mere referendum to amend the state constitution and split the government would suffice, once there is a sufficient division in language. Canada has suffered from and barely survived such division. A unified Nation the size of the United States depends on a common tongue. As Abraham Lincoln put it in his timeless speech to the Republican Illinois State Convention in 1858, "'[a] house divided against itself cannot stand.'" ROY A. BASLER, 2 COLLECTED WORKS OF ABRAHAM LINCOLN 461 (1953) (quoting *Matthew* 12:25). Although Lincoln was speaking about slavery, this eternal

principle holds true for language. The promotion of language balkanization leads to political separatism.

Federal courts do not allow language balkanization in their proceedings, not even in Spanish-speaking Puerto Rico: "All pleadings and proceedings in the United States District Court for the District of Puerto Rico shall be conducted in the English language." 48 U.S.C. §864. What works for federal court proceedings also makes the most sense for other governmental functions, including public schools, particularly where (as here) it enjoys local support. It is a colossal and costly mistake for a federal court to insist on language balkanization in the public schools against the will of the people.

Winston Churchill observed, "This gift of a common tongue is a priceless inheritance." Winston Churchill, Speech at Harvard University (Sept. 5, 1943). It is a gift for immigrants to the United States as much as to native-born Americans. English will remain the common language of the United States and American public schools are only harming students by perpetuating any inabilities to understand English. Just as all federal court proceedings in Spanish-speaking Puerto Rico are conducted in English, Arizona public schools have the right to take advantage of this "gift of a common tongue" and teach in English.

A. Bilingual Education Balkanizes Our Nation

Out of many, one: ***e pluribus unum***. For over two hundred years, America has been a country of one, including one common language. Many constitutional rights are built on the premise that

the public understands one common language. The right to a public trial requires that the public understand the language spoken at the trial. The right to petition the government assumes that the government and the public speak a common language. The right to see a warrant prior to allowing a search and seizure assumes that the recipient can understand the language of the agent presenting the warrant. The right to reasoned judicial decisions assumes that the decision is written in a language that the litigants understand.

The Constitution, including the Bill of Rights, was adopted on the assumption that there would be one language that is common to both the government and to the people. The Constitution implicitly disfavors language bifurcation that could frustrate constitutional rights to a public trial, petitioning of the government, warrants for searches and seizures, reasoned judicial opinions, and many other rights.

While English requirements have a disparate adverse impact on those who refuse to learn English, they have an enormously positive impact on those who meet the requirements and thus gain access to mainstream of American academic and economic life. *Lau v. Nichols*, 414 U.S. 563, 565 (1974) ("Teaching English to the students of Chinese ancestry who do not speak the language is one choice.").

Bilingual education, which often includes virtually no English, directly impedes the common language on which our great Nation has been built. Language division leads to political division and destructive internal conflicts. It is challenging enough to keep 300 million people "on the same

page" when they speak the same language; when they cannot even understand each other, that task becomes nearly impossible. The number of people living in the United States who cannot understand English is staggering. "Consider this: 40 million Americans will be non-English language proficient by the year 2000." 142 CONG. REC. H9741 (daily ed. Aug. 1, 1996) (statement by Rep. Goodlatte).

If 40 million non-English speakers broke off into regions of common language, then inevitably they would mandate use of their own language for legal proceedings and public business. The Puerto Rico Supreme Court, for example, denied an attempt by a litigant to use English in a local court proceeding, even though English was an official language along with Spanish. *People v. Superior Court*, 92 P.R.R. 580, 589-90 (1965) ("the means of expression of our people is Spanish, and ***that is a reality that cannot be changed by any law***") (emphasis added). There would be little reason for an enclave of foreign-speaking people not to have their own schools and governmental functions in their own language. Were this to become widespread, the United States would cease to be as "united" as it has been.

The cost of the disunity wrought by language balkanization is enormous, as demonstrated by the French-English divisions in Canada. It was only by a razor-slim 1.2% margin in 1995 that French-speaking Quebec residents failed in their referendum to secede from Canada, by a vote of 50.6% to 49.4%, and the outcome was contested for another decade until the ballots were shredded without ever being recounted. *Court ruling dashed hopes for an*

impartial recount; 1995 referendum ballots are history, THE GAZETTE (MONTREAL) A1 (July 16, 2008) ("The vote came under suspicion when several ridings in heavily federalist areas reported an abnormal number of ballots rejected for improper markings. Quebec Superior Court ruled in April [2008] that the documents could be destroyed."). A threat of re-emergence of language-based secession remains to this day. University of Ottawa history professor Michael Behiels was quoted on Dec. 4, 2008, that "[t]he secessionist movement has been ... just biding their time to watch to see if (Prime Minister Stephen) Harper would make a mistake. This is a very dangerous moment we're living through here." *Notes from Parliament Hill,* THE TORONTO STAR A23 (Dec. 4, 2008).

Portions of Quebec even voted to secede from Quebec had it seceded from Canada. "Several municipalities have held referendums asking their constituents whether, in case of Quebec's secession, they would want to stay within an independent Quebec or would prefer to remain within Canada through a partitionist process. They have usually obtained huge majorities in favor of the latter." Francois Crepeau, *The Law of Quebec's Secession,* 27 AMERICAN REVIEW OF CANADIAN STUDIES 27-50 (Sept. 1997). After all, "if a part of Canada (namely Quebec) can secede, then a part of Quebec can too." *Id.* Voters predictably want a government that speaks in their language, and bilingual education encourages the development of multiple governments:

> The [prior] conception [was] Canada is one country and only the Canadian people taken

> as a whole have a right to self-determination, to the exclusion of any of its alleged components: *au contraire,* if parts of the Canadian people may lay claim to self-determination, then other parts can too, including parts of the parts. (*Id.*)

Our own Nation, of course, also had a violent experience with secession nearly 150 years ago. But then there were powerful economic forces that bound the nation together, forces that are not as strong in the global economy of the 21st century. In Abraham Lincoln's annual address of 1862, he declared that the United States could not be broken up because it formed an indivisible economic unit, and that only its economic unity provided prosperity. GABOR S. BORITT, LINCOLN AND THE ECONOMICS OF THE AMERICAN DREAM 234 (1994). Lincoln observed that, even if the United States did disintegrate over slavery, economic incentives "would, ere long, force reunion, however much of blood and treasure the separation might have cost." BASLER, 3 COLLECTED WORKS OF ABRAHAM LINCOLN 17-18, 88, 120-21 (1953-55). Earlier, Lincoln had stated the economic case against secession as follows:

> On the side of the Union, it is a struggle for maintaining in the world, that form, and substance of government, whose leading object is, to elevate the condition of men – to lift artificial weights from all shoulders – to clear the path of laudable pursuit for all – to afford all, in unfettered start, and a fair chance, in the race for life.

BASLER, 4 COLLECTED WORKS OF ABRAHAM LINCOLN 438 (1953-55). Those economic forces that bound the Nation together in the 1860s, when there were substantial tariffs and no "off-shoring," are not as strong today.

No one today, except perhaps a veteran of the break-up of the Soviet Union, seriously predicts a break-up of the United States any time soon. Andrew Osborn, *As if Things Weren't Bad Enough, Russian Professor Predicts End of U.S.*, WALL STREET JOURNAL, A1 (Dec. 29, 2008) (Prof. Igor Panarin, dean of the Russian Foreign Ministry's academy for future diplomats, predicts U.S. dissolution into five or six pieces based in part on mass immigration and economic decline). But even those who consider U.S. disintegration unlikely nonetheless must regret the partial dissolution of the national fabric through increasing balkanization in multilingual government advertising and political campaigns. *Springs Senator Bashes Plan for Spanish Ads*, THE DENVER POST, B-02 (Jan. 27, 2009) ("All these ads are going to do is provide one more assimilation off-ramp for new arrivals"). Although the impulse to allow bilingual government may flow from a sense of openness, allowing balkanization inevitably closes communities off from each other, denying the current immigrants the shared experiences that past immigrants attained.

Rather than follow the path to balkanization, disintegration and dissolution with bilingualism, schools would be better advised to follow the example of the federal government itself, which conditions naturalization on English proficiency: "No person ...

shall hereafter be naturalized as a citizen of the United States upon his own application who cannot demonstrate ... an understanding of the English language, including an ability to read, write, and speak words in ordinary usage in the English language." 8 U.S.C. §1423(a)(1).[2] What is outrageous about this case is that Arizona has tried to follow the federal government's example, and a district court forbade it.

B. BILINGUAL EDUCATION DISENFRANCHISES THE STUDENTS SUBJECTED TO IT

The U.S. Constitution is written and implemented in English, and there is no official version in any other language. Our Rule of Law is based on more than 200 years of development of an enormous body of law in one language: English. Common law in the United States is built on 500 years of jurisprudence in one language: English. The Declaration of Independence, the Federalist Papers, Presidential speeches and Congressional debates, the U.S. Code, federal and Arizona judicial decisions, are all in English. It is impossible to translate this for bilingual education without altering its meanings. As the Spanish philosopher put it, "An idea does not pass from one language to another without change." MIGUEL DE UNAMUNO, THE TRAGIC SENSE OF LIFE,

---

[2] Congress exempted certain persons over fifty years of age and with certain physical, developmental, or mental disabilities from the English-language requirement. 8 U.S.C. §1423(b).

AUTHOR'S PREFACE, xxxiii (J.E. Crawford Flitch transl. 1921).

The Constitution's vision is inseparable from its language. James Wilson, the only member of the Pennsylvania Ratifying Convention who had a seat at the Federal Convention, argued that English was linked to America' future greatness in his summation to the Pennsylvania Ratifying Convention:

> As we shall become a nation, I trust that we shall also form a national character; and that this character will be adapted to the principles and genius of our system of government, as yet we possess none – our language, manners, customs, habits, and dress, depend too much upon those of other countries. Every nation in these respects should possess originality, there are not on any part of the globe finer qualities, for forming a national character, than those possessed by the children of America... [In addition to a respectable national character,] I think there is strong reason to believe, that America may take the lead in literary improvements and national importance. This is a subject, which I confess, I have spent much pleasing time in considering. ***That language, sir, which shall become most generally known in the civilized world, will impart great importance over the nation that shall use it. The language of the United States will, in future times, be diffused over a greater extent of country, than any other that we now know.*** The

> French, indeed, have made laudable attempts toward establishing an [sic] universal language, but, beyond the boundaries of France, even the French language is not spoken by one in a thousand. Besides, the freedom of our country, the great improvements she has made and will make in the science of government, will induce the patriots and literati of every nation to read and understand our writings on that subject, and hence it is not improbable that she will take the lead in political knowledge.

James Wilson, Summation Address to the Pennsylvania Ratifying Convention (Dec. 11, 1787), *reprinted in* THE DEBATE ON THE CONSTITUTION – FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 865-66 (Gryphon Eds. 1993) (emphasis added). Now is not the time to reverse course.

Bilingual education of students in Arizona hurts their education. English is becoming "the lingua franca of the [21st] century" for the world, as admitted by Germany's leading newspaper: "After trying for decades to persuade more Britons to learn their language, the Germans have given up the struggle. Instead, they are promoting English as the language of the 21st century, with lessons for children as young as six." Toby Helm, *English is Language of Today, Germans Admit,* LONDON TELEGRAPH (Apr. 6, 2000) (quoting the *Frankfurther Allgemeine Zeitung*, interior quotations omitted). Switzerland has German, French, and Italian for its

official languages, but it also embraced English to be taught as the second language of choice, rather than its official languages. Fiona Fleck, *Swiss Want English as Second Language*, LONDON TELEGRAPH (Oct. 29, 2000).

English has some inherent advantages for technology, which ensure its future dominance as the most popular language. English has the smallest alphabet of major languages, including its lack of accented, hybrid, and pictograph characters. This facilitates efficient typing, the method for communicating over the internet, and allows use of the most basic character sets. English also features easy interchangeability of nouns, verbs, and adjectives, without much variance in form for pronouns and verbs. That promotes easy communication through brief, cryptic messages, the style preferred by electronic media. Students are hampered by not learning English.

English also features a powerful pipe-like quality, such that one phrase can be cut and pasted to another phrase with ease. Foreign phrases or terms can be inserted at will into English sentences, and the English language has grown enormously from its flexibility in incorporating words and phrases from other languages. Computer-based cutting and pasting text works more efficiently in English than in many other languages, such as those using pictorial characters. This is largely happenstance, but nevertheless gives English an advantage in the internet medium. Accordingly, English has exploded in worldwide popularity since the advent of the internet, and about 80% of the

internet uses English. English is now the second most widely spoken language in the world, with only Chinese dialects spoken by more people. English is overwhelmingly the second language of choice for non-English-speaking people. See Barbara Wallraff, *What Global Language?* 286 ATLANTIC MONTHLY No. 5, at 52 (Nov. 2000) (noting, *inter alia*, that "English is the working language of the Asian trade group ASEAN" and is also "the official language of the European Central Bank").

The entire world has been moving towards mandatory English. The New York City Bar Association recommended mandatory English for air travel, for example, citing this example:

> In 1993, Chinese pilots flying a U.S.-made MD-80 were attempting to land in northwest China. The pilots were baffled by an audio alarm from the plane's ground proximity warning system. A cockpit recorder picked up the pilot's last words: "What does 'pull up' mean?" What is needed, both in the U.S. and worldwide, is a mandatory spoken English test for pilots and controllers.

Aeronautics Committee of New York City's Bar Association Seeks to Raise the Bar on Safety, 12 AIR SAFETY WEEK, at 33 (Aug. 17, 1998). Although the lack of shared language has caused other airliner crashes,[3] the larger point is that this balkanization

---

[3] The well-publicized crash of ValuJet Flight 592 in the Florida Everglades in 1996, killing all 110 on

(Footnote cont'd on next page)

inflicts similar disconnects countless times every day, across the range of human interactions, with incalculable – but avoidable – negative impacts.

C. COURTS LACK AUTHORITY TO REQUIRE EDUCATION IN LANGUAGES OTHER THAN ENGLISH

A federal court can no more require States to depart from English in official documents than it could draft an official Constitution or Declaration of

---

(Footnote cont'd from previous page.)

board, was caused by mistakenly loading oxygen canisters as cargo. The investigation revealed that the canisters labeled as "repairable" had been misunderstood as "empty," and at one point the National Transportation Safety Board suggested that the use of non-English speaking mechanics may have been a problem. William Langewiesche, *The Lessons of ValuJet 592,* 281 ATLANTIC MONTHLY No. 3, 81 (Mar. 1998). With respect to the worst air disaster of all-time – the crash of a KLM 747-200 into a Pan Am 747-100 in Tenerife, Canary Islands in 1977 – the official report found that "inadequate language" was a cause. The KLM pilot used the phrase "we are now at take-off" when he meant to state that he was now taking off, and thereby proceeded to crash into another airplane on the runway and kill 583 persons on both planes. Report of the Secretary of Civil Aviation, Spain (Oct. 1978), *reprinted in* AIRCRAFT ACCIDENT DIGEST (ICAO Circular 153-AN/56, 22-68).

Independence translated into a different language. Our Nation was formed based on a one-language legal system, and States have full authority to adhere completely to that language in their official documents and in their public schools.

In contrast with other countries, the United States is governed by a written Rule of Law – defined and applied in English. Constitutional terms such as "due process of law," "high crimes and misdemeanors," and "common law" lack precise equivalents in other languages. Other constitutional law terms such as "freedom of speech," "cruel and unusual punishment," and "involuntary servitude" likewise lack identical counterparts in other languages. *See* Gregory Rabassa, No Two Snowflakes are Alike: Translation as Metaphor, at 1, *reprinted in* JOHN BIGUENET AND RAINER SCHULTE, THE CRAFT OF TRANSLATION 1 (1989) ("We should certainly not expect that a word in one language will find its equal in another"). Translation of the Constitution, or the enormous body of Supreme Court decisions construing it, into another language would create endless uncertainties and opportunities for alteration inherent in the translation process. *See, e.g.*, GEORGE STEINER, AFTER BABEL: ASPECTS OF LANGUAGE AND TRANSLATION 428 (3d ed. 1998) (noting the impossibility of perfect translation). Even a familiar phrase like "the American dream" encounters thorny problems of translation to other languages used in the Americas, where "America" does not mean the "United States."

As observed by Professor Edward Sapir of the University of Chicago and later of Yale University,

"No two languages are ever sufficiently similar to be considered as representing the same social reality." *Id.* at 91 (quoting D. MANDELBAUM (ed.), SELECTED WRITINGS IN LANGUAGE, CULTURE AND PERSONALITY BY EDWARD SAPIR (1949)). Nor could Courts require States to depart from English in their laws and regulations. Courts lack this authority to require States to depart from English. "Government of the people, by the people, and for the people" ensures that the people have the power to require that public school education be in a common language.

Translating key terms of the Constitution would modify them without complying with the amendment process. Moreover, translating the 200-plus years of judicial interpretations into a different language would change their meaning. Imagine the Supreme Court being required to review lower court opinions written in a different language. That would introduce substantial translation complexities – and interference with the judicial process. Courts could not circumvent the amendment process by promulgating the Constitution in a different language.

II. COURTS MUST ALTER INSTITUTIONAL-REFORM INJUNCTIONS UNSUPPORTED BY CURRENT FACTS AND LAW

This Court's precedents are clear on institutional-reform litigation judgments and decrees no longer supported by the current law or facts. Principles of federalism require federal courts to grant relief under FED. R. CIV. P. 60(b)(5) when the facts or law have changed sufficiently from those that purportedly justified entry of the judgment or

decree. *See, e.g., Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 385 (1992); *Frew v. Hawkins*, 540 U.S. 431, 441-42 (2004). A finding that a school violated federal law *in the past* cannot condemn a school system to "judicial tutelage ***for the indefinite future***." *Board of Educ. of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 249 (1991) (emphasis added). Instead, when the school system has complied with the relevant law under the judgment or decree "for a reasonable period of time," the "necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination." *Dowell*, 498 U.S. at 248 (interior quotations omitted). This is basic, and the Ninth Circuit ignored it.

Indeed, *Dowell* involves a school district previously held to have violated the Fourteenth Amendment with intentional discrimination. As explained in more detail in Section III, *infra*, this Court's flexible standard, sensitive to federalism concerns in institutional-reform litigation, is even more appropriate for violations of EEOA's vague "appropriate action" standard, which does not involve intentional discrimination under the Fourteenth Amendment. This Court should reverse the Ninth Circuit under the institutional-reform precedents and Rule 60(b)(5).

III. The Lower Courts Usurped the State and Local Governments' Roles of Determining How to Manage and Fund Public Education

Lacking the institutional expertise to serve as chancellors of education, the lower courts owe great deference to State and local government on the preeminently local preserve of education. Notwithstanding these factors, the lower courts not only commandeered English-language instruction in Arizona's schools but also – by claiming funding that Arizona would devote to other pressing educational needs – essentially commandeered Arizona's public education system.

While this is particularly egregious conduct in the annals of federal-court supervision of State and local schools, it becomes all the more egregious in consideration of EEOA's broad discretion for State and local governments to select an "appropriate action." As explained in Section IV, *infra*, a district court's only available remedy for a school that fails to provide "appropriate action" under EEOA is to order the school to take appropriate action. In other words, ***inaction*** is actionable. The choice from among the range of appropriate actions, however, rests solely in the school's discretion, not in a court's discretion.

Both federalism and separation of powers argues for extricating the courts from Arizona's schools, now that the underlying ELL deficiencies are cured. ***First,*** "local autonomy of school districts is a vital national tradition." *Dayton Bd. of Ed. v. Brinkman,* 433 U.S. 406, 410 (1977). ***Second,*** even more than the federal government generally, federal judges

simply lack the institutional expertise needed to run school systems:

> Federal judges cannot make the fundamentally political decisions as to which priorities are to receive funds and staff, which educational goals are to be sought, and which values are to be taught. When federal judges undertake such local, day-to-day tasks, they detract from the independence and dignity of the federal courts and intrude into areas in which they have little expertise.

Missouri v. Jenkins, 515 U.S. 70, 133 (1995) (Thomas, J., concurring) (citing Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949 (1978)). For the lower courts to have involved themselves to this extent in Arizona's school systems is genuinely remarkable.

Moreover, the lower courts' "throw money at the problem" solution not only would waste money but also would detract from other educational priorities. Indeed, as the Superintendent argues, the evidence is uncontroverted that (1) increasing funding without structural reforms would not have led to different outcomes; (2) Nogales' problems did not result from a lack of funding; and (3) the Nogales ELL program does not need more money. Superintendents' Br. at 23. Involving federal courts in this political process tarnishes the federal judiciary.

As President Nixon stated to Congress in his message forwarding the EEOA legislation, this Nation's history with federal decrees on school systems finds those decrees "sometimes sound, sometimes bizarre, but certainly uneven." 118 CONG.

REC. 8931 (1972). His intent and that of EEOA was that courts would get out of the business of running school systems by imposing only the remedy essential to correct the particular violation. *Id.;* 20 U.S.C. §1712. By going well beyond the remedy "***essential*** to correct particular denials of equal educational opportunity," 20 U.S.C. §1712 (emphasis added), the lower courts exceeded their authority under EEOA.

IV. COURTS MUST READ EEOA'S "APPROPRIATE ACTION" CONSISTENTLY WITH OTHER FEDERAL LEGISLATION

Eagle Forum ELDF agrees with the petitioners that Arizona's compliance with NCLB places it well outside a court's prerogative to find Arizona's actions ***inappropriate*** under EEOA. In addition to its agreement with petitioners, however, Eagle Forum ELDF adds two important points. ***First,*** if no federal statute cabins the determination of what constitutes "appropriate action," EEOA raises a non-justiciable political question placed entirely within the hands of the implementing educational and legislative authorities. ***Second,*** even before NCLB, federal statutes contemporaneous with EEOA provided governing principles that demonstrate Arizona's compliance with EEOA.

Even if this Court did not have an ***obligation*** to look to NCLB and other federal law to flesh out EEOA's appropriate action, the availability of such standards avoids what otherwise would be nonjusticiable for want of "any law to apply." *Chrysler Corp. v. Brown*, 441 U.S. 281, 317-18 (1979). Thus, either because it can or because it must, this

Court should look to NCLB and other federal law to define and confine EEOA's otherwise amorphous requirements.

A. WITHOUT GOVERNING PRINCIPLES, EEOA'S APPROPRIATE ACTION IS NON-JUSTICIABLE

Assuming *arguendo* that no federal legislation cabins the definition of "appropriate action" under EEOA, that aspect of EEOA would not be justiciable, either because it presents a political question or it is an issue committed to the discretion of educational and legislative officials. The political-question doctrine arises out of the same Article III limitations on federal courts' powers as standing, mootness, and ripeness, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352-53 (2006), and so would require dismissal of this litigation:

> On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and ***then of the court from which the record comes***. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it. The requirement that jurisdiction be established as a threshold matter spring[s] from the nature and limits of the judicial power of the United States and is inflexible and without exception.

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94-95 (1998) (emphasis added, citations and interior quotations omitted). So "if the record discloses that the lower court was without

jurisdiction," appellate courts such as this Court "have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *Steel Co.*, 523 U.S. at 95. As explained below, and again assuming *arguendo* that no federal legislation cabins a court's determining what constitutes "appropriate" action, EEOA §1703(f) is non-justiciable.

Some legal questions are "entrusted to one of the political branches or involve no judicially enforceable rights." *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004) (plurality opinion of Scalia, J.). As Justice Kennedy explained in his concurring opinion, "courts must be cautious about adopting a standard that turns on whether the partisan interests in the redistricting process were excessive" because "[e]xcessiveness is not easily determined." *Vieth*, 541 U.S. at 316 (Kennedy, J., concurring). Like excessiveness, appropriateness is not easily determined from among the accepted means of educating students. As the only unelected branch of government, courts are the *least* fit to answer such questions. *Luther v. Borden*, 48 U.S. 1, 52-53 (1849) ("making judges supreme arbiters in political controversies ... [would] dethrone [the people] and lose one of their ... invaluable birthrights"). In the absence of federal law to apply to determine whether a school's chosen action is "appropriate action," this Court should dismiss this action as a non-justiciable political question.

In addition to being non-justiciable as a political question, the selection of an "appropriate action" also is committed to the discretion of educators and legislators because there is no law for a reviewing

court to apply when choosing among appropriate actions. Although this variety of nonreviewability frequently arises under the federal Administrative Procedure Act ("APA"), *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), EEOA presents the same problem: "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Indeed, these cases predate the APA, *Gray v. Powell*, 314 U.S. 402, 412 (1941), and form a "common law" of "nonreviewability." Kenneth Culp Davis, *"Nonreviewable Administrative Action,"* 96 U. PA. L. REV. 749, 750-51 (1948). Review is particularly outside judicial expertise when, as here, "the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms." *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 318 (1958). For the foregoing reasons, while Eagle Forum ELDF does not doubt that a court could review a school's ***failure to act***, EEOA does not provide the law to apply for a court to find whether one action is more appropriate than another.

A rule that limits judicial review of EEOA compliance to ensuring the selection of a presumptively appropriate form of English language education is consistent with the Court's precedents on actionable inaction. *See, e.g., City of Canton, Ohio v. Harris*, 489 U.S. 378, 388 (1989) ("inadequacy of police training may serve as the basis for §1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with

whom the police come into contact"); *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (inaction litigable under 5 U.S.C. §706(1) "only where a plaintiff asserts that an agency failed to take a ***discrete*** agency action that it is ***required to take***") (emphasis in original); *Gomez v. Illinois State Board of Education*, 811 F.2d 1030, 1143 (7th Cir. 1987) ("[a]lthough the meaning of 'appropriate action' may not be immediately apparent without reference to the facts of the individual case, it must mean something more than 'no action'"). This Court should apply the same reasoning and limit EEOA "appropriate action" litigation to ensuring that schools have adopted ***an*** appropriate action, from among the wide array of actions available to schools.

Eagle Forum's ELDF's proposed rule is consistent with §1712's limiting remedies to those "***essential*** to correct particular denials of equal educational opportunity." 20 U.S.C. §1712 (emphasis added). The remedy essential to correct denial of an "appropriate action" is to require the school to take ***an*** appropriate action: courts do not have a say in ***which*** appropriate action. Finally, the rule is at least congruent with the *Pickard* three-part test, *Castaneda v. Pickard*, 648 F.2d 989, 1009-10 (5th Cir. 1981), although Eagle Forum ELDF respectfully submits that a court's analysis of the second and third tests must be extremely deferential.

As explained above – assuming *arguendo* that federal legislation does not cabin courts' discretion in evaluating the appropriateness of State and local action – EEOA §1703(f) would not be justiciable. As explained in the next two sections however, both

before and after NCLB, federal law ***has*** cabined the otherwise vague term "appropriate," and Arizona's actions unquestionably fall within that term.

B. NCLB Provides Governing Principles

The Speaker of the House, President of the Senate, and Superintendent argue persuasively that, in enacting NCLB's Title III in 2002, Congress necessarily made Nogales' (and Arizona's) NCLB-compliant actions "appropriate" for EEOA purposes. *See* Legislative Petitioners' Br. at 51-57; Superintendent's Br. at 51-61; *cf. Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380-81 (1969) ("[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction"). Eagle Forum ELDF wholeheartedly supports their arguments and need not repeat them.

Based on their arguments at the petition stage, Arizona Opp'n, at 16; Flores Opp'n, at 27, the respondents presumably will counter by citing two NCLB savings clauses (20 U.S.C. §§6845, 6847) for the proposition that NCLB expressly did not undo either EEOA itself or any decrees under EEOA. Specifically, §6845 provides that nothing in ELALEAAA "require[s] a State or a local educational agency to establish, continue, or eliminate any particular type of instructional program for limited English proficient children," and §6847 provides that nothing in ELALEAAA "shall be construed in a manner inconsistent with any Federal law guaranteeing a civil right." 20 U.S.C. §§6845(2), 6847. These savings clauses do not save the respondents for two independent reasons.

First, these savings clauses simply do not address the thrust of the argument that the Speaker of the House, President of the Senate, and Superintendent make. No-one argues that NCLB either ***requires*** the elimination of EEOA-compliant programs or ***amends*** EEOA by implication in a manner inconsistent with the pre-NCLB EEOA. Instead, the petitioners and Eagle Forum ELDF argue that NCLB provides an authoritative – indeed, controlling – statutory context for the scope of EEOA's "appropriate action" with respect to English instruction. To hold otherwise, this Court must find that, in NCLB, Congress enacted an inappropriate action. Eagle Forum ELDF respectfully submits that it falls well outside the courts' institutional expertise to make that finding.

Second, as explained in the next section, pre-NCLB federal legislation ***already*** elevated Arizona's English immersion program as "appropriate" under EEOA. While Eagle Forum ELDF agrees with petitioners that the NCLB savings clauses do not negate NCLB's ability to define or cabin "appropriateness" under EEOA, the savings clauses certainly do not render ***inappropriate*** that which ***already was appropriate,*** prior to NCLB's enactment. *See Morton v. Mancari,* 417 U.S. 535, 549-51 (1974) (repeals by implication are disfavored); *accord* 20 U.S.C. §§6845(2) (NCLB does not deprive Nogales of right to rely on actions deemed appropriate, prior to NCLB's enactment). For the reasons explained in the next section, therefore, Arizona's English immersion "actions" certainly are "appropriate" under EEOA.

C. PRE-NCLB LAWS PROVIDED GOVERNING PRINCIPLES

Federal statutory actions contemporaneous with EEOA's enactment and prior to NCLB's enactment also provide governing principles on which federal courts must base their determination of what actions are "appropriate actions." As such, the question is not whether plaintiffs lost on this issue in the 1990s, before the consent decree, versus in the 2000s, with NCLB's enactment after the consent decree. Plaintiffs lost this issue in the 1980s, if not in the 1970s.[4]

By enacting both EEOA and the Bilingual Education Act in the Education Amendments of 1974, Congress plainly set up a situation where the general provisions of §1703(f)'s requirement of "appropriate action" would be cabined by what the Bilingual Education Act required, prohibited, and allowed. "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *U.S. v. Heirs of Boisdoré,* 49 U.S. (8 How.) 113, 122 (1849); *Offshore Logistics, Inc. v.*

---

[4] As indicated in the prior section, because federal law ***already*** cabined "appropriate action" to include English immersion, this Court must reject respondents' argument that, as enacted in 2002, 20 U.S.C. §6847 somehow prevents petitioners' relying on NCLB's remedial scheme to provide governing principles on "appropriate action" under EEOA.

Tallentire, 477 U.S. 207, 220-21 (1986) (same); *cf. Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) ("specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment"). Under these precedents, common sense, and the respect that courts owe to Congress, this Court should read EEOA in conjunction with the Bilingual Education Act, as amended.

Courts read statutes as a whole not only because they owe that respect to the co-equal branch that wrote the statute but also to avoid "untenable" or "unreasonable" interpretations. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982) ("[s]tatutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible"). Indeed, *American Tobacco* involved this Court's rejection of a federal agency's interpretation of a statute that "would make it illegal to adopt, and in practice to apply, seniority systems that fall within the class of systems protected by the provision." *Id.* That is exactly the untenable situation here: a district judge has interpreted EEOA to prohibit a form of English instruction expressly allowed by Congress.

Specifically, in 1984, Congress expressly amended the Bilingual Education Act to "declare[] it to be the policy of the United States, in order to establish equal educational opportunity for all children and to promote educational excellence ... to encourage the establishment of special alternative instructional programs for students of limited English proficiency in school districts where the establishment of bilingual education programs is not

practicable or for other appropriate reasons." PUB. L. NO. 98-511, §201(a) , 98 Stat. 2366, 2370-71 (1984); *accord* PUB. L. NO. 100-297, §7002(a), 102 Stat. 130, 275 (1988) (same); S. REP. NO. 100-222, at 77, *reprinted in* 1988 U.S.C.C.A.N. 101, 178 (1984 Bilingual Education Act amendments authorized federal funding for "special alternative instructional programs" such as "English as a Second Language" and "structured immersion"); H.R. REP. NO. 98-748, 7, *reprinted in* 1984 U.S.C.C.A.N. 4036, 4042 ("new category of special alternative instructional programs for LEP children is established as an alternative to transitional or development programs [that] might include approaches such as English-as-a-Second Language (ESL) or structured immersion"). The "special alternative instructional" or "SAI" program – including immersion – remained part of the Bilingual Education Act from 1984 through NCLB's enactment. *See* PUB. L. NO. 103-382, §7112, 108 Stat 3518, 3719-20 (1994) (1994 amendments). As such, respondents and the lower courts cannot evade immersion through NCLB's savings clauses.

In introducing the Bilingual Education Act amendments ultimately enacted in 1988, Representative Jeffords expressed the sentiment behind SAI programs:

> It is not the role of the Federal Government to dictate the method of instruction to be used at the local level, but rather to establish policy which supports the attainment of English language proficiency by the target population.

132 CONG. REC. H1709 (daily ed. Apr. 9, 1986) (Statement of Rep. Jeffords). In doing so, Congress not only expressly amended the Bilingual Education Act, but also impliedly amended the scope of "action" deemed "appropriate" under EEOA. *See, e.g., Erlenbaugh v. U.S.*, 409 U.S. 239, 243 (1972) (statutes "in *pari materia* – that is, [statutes that] pertain to the same subject – ... under settled principles of statutory construction, should ... be construed as if they were one law"); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) ("subsequent acts can shape or focus th[e] meanings" of prior statutes); *U.S. v. Estate of Romani*, 523 U.S. 517, 530-31 (1998). The "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." *U.S. v. Fausto*, 484 U.S. 439, 453 (1988). Under that classic judicial task, this Court must find that Congress has deemed English immersion as an "appropriate action" *per se*.

English immersion is undeniably an educational method that works, that Congress has authorized, and that preserves our national identity. While it is not the Congress' role to dictate State methods of instruction, it even more strongly is not the role of a federal judge to do so. Because the Bilingual Education Act consistently allowed English immersion as a means of instruction from 1984 through the enactment of NCLB in 2002 (and since), Eagle Forum ELDF respectfully submits that the plaintiffs and the district court have it precisely

backwards. The question is not whether NCLB's savings clause in §6845(2) protects their injunction under EEOA. *See* 20 U.S.C. §6845(2) ("[n]othing in this part shall be construed ... to require a State or a local educational agency to ... eliminate any particular type of instructional program for limited English proficient children"). The question is whether §6845(2) prohibits anyone's denying that English immersion is an "appropriate action" under federal law.

The answer is that §6845(2) plainly prohibits courts from denying schools the right to use English immersion. *Id.; see also* 20 U.S.C. §1712 ("court ... shall seek or impose only such remedies as are ***essential*** to correct particular denials of equal educational opportunity" under EEOA) (emphasis added). Because English immersion is *per se* an appropriate action, a court simply lacks discretion under EEOA to require anything else from a school that provides English immersion. Under the circumstances, this case is not an instance of merely ***disfavoring*** repeals by implication, *Morton,* 417 U.S. at 549-50, but one where the Court "should be particularly hostile to [repeals by implication because] the allegedly repealing statute ***specifically rules them out.***" *Jett v. Dallas Independent School Dist.,* 491 U.S. 701, 746 (1989) (emphasis added). Following 25 years of congressional policy, this Court must accept immersion as an "appropriate action."

CONCLUSION

For the foregoing reasons and those argued by the petitioners, this Court should reverse the Ninth

Circuit's decision and remand with instructions to vacate the district court's injunction.

Respectfully submitted,

LAWRENCE J. JOSEPH
1250 CONN. AVE, NW
SUITE 200
WASHINGTON, DC 20036
(202) 669-5135

ANDREW L. SCHLAFLY
Counsel of Record
939 OLD CHESTER ROAD
FAR HILLS, NJ 07931
(908) 719-8608

Counsel for Amicus

Dated: February 25, 2009

AMICUS CURIAE BRIEF

121

14

Supreme Court, U.S.
FILED
FEB 26 2009
OFFICE OF THE CLERK

No. 08-294
(consolidated with No. 08-289)

In the Supreme Court of the United States

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES and PRESIDENT OF THE ARIZONA SENATE,

Petitioners,

v.

MIRIAM FLORES, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF EDUCATION-POLICY SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

STEPHEN M. SHAPIRO
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600

DAN HIMMELFARB
Counsel of Record
SCOTT A. CLAFFEE
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

BOTH 4CVTPX

86415 0 23

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.... ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND
SUMMARY OF ARGUMENT 4

ARGUMENT:

SOUND EDUCATION POLICY FOCUSES ON SETTING STANDARDS AND MEASURING RESULTS, NOT SIMPLY ON INCREASING RESOURCES 6

A. Increased Education Funding Has Not Led To Improved Student Performance 7

B. Court-Ordered Remedies Should Afford States The Flexibility To Make Decisions About Inputs As Long As They Are Obtaining The Desired Outcomes 11

C. NCLB Reflects The Consensus View That Focuses On Output Accountability In Education Policy 14

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

Cases

Bd. of Educ. v. *Dowell*, 498 U.S. 237 (1991) 13

Missouri v. *Jenkins*, 515 U.S. 70 (1995) 12

San Antonio Indep. Sch. Dist. v. *Rodriguez*, 411 U.S. 1 (1973) 12

Statutes and Rules

Equal Educational Opportunities Act of 1974, Pub. L. No. 93-380, tit. II, 88 Stat. 514 10

No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) ..... *passim*

20 U.S.C. § 1701 10

20 U.S.C. § 6311 16

20 U.S.C. § 6812 ..... 15, 16

S. Ct. R. 37.3 1

S. Ct. R. 37.6 1

Other Authorities

Bruce D. Baker & Paul L. Markham, *State School Funding Policies and Limited English Proficient Students*, 26 BILINGUAL RES. J. 678 (2002) 9, 13

TABLE OF AUTHORITIES—continued

Page(s)

CTR. ON EDUC. POL'Y, ANSWERING THE QUESTION THAT MATTERS MOST: HAS STUDENT ACHIEVEMENT INCREASED SINCE NO CHILD LEFT BEHIND? (2007) 15

Williamson M. Evers & Paul Clopton, *High-Spending, Low-Performing School Districts*, in COURTING FAILURE: HOW SCHOOL FINANCE LAWSUITS EXPLOIT JUDGES' GOOD INTENTIONS AND HARM OUR CHILDREN 103 (Eric A. Hanushek ed. 2006) 10

ERIC A. HANUSHEK & ALFRED A. LINDSETH, SCHOOLHOUSES, COURTHOUSES AND STATEHOUSES: SOLVING THE FUNDING-ACHIEVEMENT PUZZLE IN AMERICA'S PUBLIC SCHOOLS (forthcoming May 2009) ..... *passim*

Eric A. Hanushek & Margaret E. Raymond, *Does School Accountability Lead to Improved Student Performance?*, 24 J. POL'Y ANALYSIS & MGMT. 297 (2005) 15

Alfred A. Lindseth, *The Legal Backdrop to Adequacy*, in COURTING FAILURE: HOW SCHOOL FINANCE LAWSUITS EXPLOIT JUDGES' GOOD INTENTIONS AND HARM OUR CHILDREN 33 (Eric A. Hanushek ed. 2006) 7, 13

TABLE OF AUTHORITIES—continued

Page(s)

Jennifer A. O'Day & Marshall S. Smith, *Systemic School Reform and Educational Opportunity*, in DESIGNING COHERENT EDUCATION POLICY 250 (Susan H. Fuhrman ed. 1993) 14

Marguerite Roza & Paul T. Hill, *How Can Anyone Say What's Adequate If Nobody Knows How Money Is Spent Now?*, in COURTING FAILURE: HOW SCHOOL FINANCE LAWSUITS EXPLOIT JUDGES' GOOD INTENTIONS AND HARM OUR CHILDREN 235 (Eric A. Hanushek ed. 2006) 13

INTEREST OF *AMICI CURIAE*

Amici are 21 prominent scholars and researchers in the field of education policy who have extensively studied, researched, and written about the effects of court-ordered funding remedies and institutional reform on student performance.* *Amici* have diverse backgrounds and perspectives. They are:

- David J. Armor, Professor of Public Policy at George Mason University and former member of the Los Angeles Board of Education;
- John E. Chubb, Distinguished Visiting Fellow at the Hoover Institution of Stanford University and founding partner of Edison Schools, Inc.;
- Julie Berry Cullen, Associate Professor of Economics at the University of California, San Diego;
- David Figlio, the Orrington Lunt Professor of Education and Social Policy at Northwestern University;
- Chester E. Finn, Jr., Senior Fellow at the Hoover Institution of Stanford University and former Assistant Secretary for Research and Improvement in the U.S. Department of Education;

---

* Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, the parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

- Dan Goldhaber, Research Professor at the Center on Reinventing Public Education at the University of Washington Bothell;
- James W. Guthrie, Professor of Public Policy and Education and Director of the Peabody Center for Education Policy at Vanderbilt University;
- Eric A. Hanushek, the Paul and Jean Hanna Senior Fellow at the Hoover Institution of Stanford University;
- James J. Heckman, the Henry Schultz Distinguished Service Professor of Economics at the University of Chicago and a 2000 Nobel Laureate in Economics;
- Frederick M. Hess, Resident Scholar and Director of Education Policy Studies at the American Enterprise Institute and Research Associate at the Harvard University Program on Education Policy and Governance;
- Paul T. Hill, the John and Marguerite Corbally Professor and Director of the Center on Reinventing Public Education at the University of Washington Bothell;
- Tom Loveless, the Herman and George R. Brown Chair and Senior Fellow in Governance Studies at the Brookings Institution;
- Terry M. Moe, the William Bennett Munro Professor of Political Science at Stanford University;
- Paul E. Peterson, the Henry Lee Shattuck Professor of Government and Director of the Program on Education Policy and Governance at Harvard University;

- Michael J. Podgursky, Professor of Economics at the University of Missouri;
- Steven G. Rivkin, Department Chair and Professor of Economics at Amherst College;
- James R. Smith, President and CEO of Management Analysis & Planning, Inc. and former Deputy Superintendent of the California Department of Education;
- Abigail Thernstrom, Adjunct Scholar at the American Enterprise Institute, Vice-Chair of the U.S. Commission on Civil Rights, and former member of the Massachusetts Board of Education;
- Stephan Thernstrom, the Winthrop Research Professor of History at Harvard University;
- Herbert J. Walberg, Emeritus Professor of Education and Psychology at the University of Illinois at Chicago; and
- Martin R. West, Assistant Professor of Education, Political Science, and Public Policy at Brown University.

Amici submit this brief to inform the Court of the effect on school administration and student achievement of school-finance lawsuits that result in funding increases unaccompanied by any meaningful reform. *Amici* believe that the No Child Left Behind Act of 2001 (NCLB or Act), Pub. L. No. 107-110, 115 Stat. 1425 (2002), is a clear reflection of the dominant view of scholars that educational reform should focus on student performance—the output of school systems—rather than inputs such as funding levels.

Amici have a particular interest in ensuring that federal courts do not prevent States from enacting

innovative and comprehensive structural reforms designed to improve student performance by mandating particular funding levels and earmarks for individual programs. *Amici* also have a strong interest in having courts respect the underlying principle reflected in NCLB that a clear outcome-focused approach is central to a sound education policy.

Amici claim no specific legal expertise and submit this brief in their capacity as academics and researchers.

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals affirmed the district court's injunction directing the State of Arizona to increase funding earmarked for English-language-learner (ELL) programs. *Amici* believe that the injunction reflects a mistaken judgment about education policy and sets a harmful precedent for our Nation's children.

The lower courts found that Arizona was not doing enough to improve the performance of its ELL students and ordered the State to appropriate more money for the specific purpose of funding ELL instruction. This remedy—like most court-ordered funding remedies—is destined to fail. There is virtually no evidence that ordering an increase in funding by itself leads to a significant positive effect on student achievement. It is far more important for States to focus on structural reform and on how their money is spent than on the bottom line of the education budget. More funding is effective only when it is coupled with an effort to eliminate waste and inefficiency and to institute effective programs and hiring policies. States and school districts will have no in-

centive to make difficult choices if courts continue to make increased funding the centerpiece of their remedies.

Federal judges lack the experience and expertise to make decisions about the administration of schools and the allocation of State resources. Instead of ordering more funding, courts should allow States the flexibility to find solutions to their educational problems by focusing on outcomes and accountability. This is the consensus view of education-policy experts, and there is substantial evidence that it works. Indeed, it has been proven to work *in this case*. When Arizona and the Nogales Unified School District (Nogales) began to spend their money more efficiently and to monitor the progress of ELL students, they saw significant improvement in achievement. It is precisely this type of outcome-based innovation that courts should be encouraging, rather than restricting it by rigidly adhering to the view that funding is the answer.

In passing NCLB with the strong support of various civil-rights groups, Congress recognized that this thinking on education policy was the best way to improve the achievement of America's schoolchildren and that simply looking at inputs did not lead to desired results. NCLB provides for accountability by setting objective standards and measuring progress toward achievement goals. It allows States the flexibility to determine how to meet these goals, thus ensuring that education-policy decisions are made by those best suited to the task. Measuring student performance on state assessments is a means to evaluate whether States and school districts are making progress in a meaningful way, instead of simply deciding whether they are spending enough

money. Arizona and its school districts are on the right track, having made difficult decisions that reflect sound education-policy judgments. Their efforts should be given the opportunity to succeed.

ARGUMENT

SOUND EDUCATION POLICY FOCUSES ON SETTING STANDARDS AND MEASURING RESULTS, NOT SIMPLY ON INCREASING RESOURCES

The court of appeals upheld the district court's funding mandate as a remedy for perceived deficiencies in the administration of Arizona's school systems. The lower courts' approach continues a disturbing trend that reinforces bad education policy through court-ordered funding remedies. As we explain in this brief, the dominant approach to education policy focuses on the outcomes of school administration and seeks to hold States accountable for student performance.

Studies have overwhelmingly shown that court-ordered funding remedies—attempts to improve student performance just by varying the inputs—are consistently ineffective. See *infra* Point A. As a consequence, courts should resist imposing these types of remedies, which restrict States' options for improving student performance; instead, States and schools should be focused on meeting objective performance standards. See *infra* Point B. Federal passage of NCLB reflects this consensus approach to education policy: it supports an output-focused framework where States are allowed the flexibility to decide how to meet their learning standards, and it provides a clear way to evaluate progress towards

accomplishing that task based on student achievement. See *infra* Point C.

A. Increased Education Funding Has Not Led To Improved Student Performance

There is scant evidence that past judicial actions concerning school finance have had any beneficial effect on student performance. Indeed, even without courts' involvement, general spending on K-12 education has grown substantially over the last 30 to 40 years; but despite an almost four-fold increase in resources since 1960, national test scores have shown very little progress in student achievement. See Alfred A. Lindseth, *The Legal Backdrop to Adequacy*, in COURTING FAILURE: HOW SCHOOL FINANCE LAWSUITS EXPLOIT JUDGES' GOOD INTENTIONS AND HARM OUR CHILDREN 33, 62-63 (Eric A. Hanushek ed. 2006). When courts get involved, the results are equally stark:

> Virtually no peer-reviewed or other credible articles or studies claim to have found significant, positive effects [of court-ordered funding remedies] on student achievement * * *. The harsh reality is that in those states where a court-ordered remedy has been in effect long enough for a fair evaluation, patterns of student failure, especially for poor and minority students, have not significantly changed.

ERIC A. HANUSHEK & ALFRED A. LINDSETH, SCHOOLHOUSES, COURTHOUSES AND STATEHOUSES: SOLVING THE FUNDING-ACHIEVEMENT PUZZLE IN AMERICA'S PUBLIC SCHOOLS 146 (forthcoming May 2009).

Amicus Eric Hanushek and his co-author Alfred Lindseth recently examined the performance of stu-

dents in four States—Kentucky, Massachusetts, New Jersey, and Wyoming—that experienced extraordinary funding increases as a result of court-ordered remedies in "adequacy" suits, actions directed at States that have allegedly failed to provide a level of education sufficient to satisfy the requirements of the state constitution. Focusing on the National Assessment of Educational Progress scores for the students who historically performed worst and were the principal target of court-ordered remedial dollars, the authors found that, relative to the rest of the Nation, the results in three of the four States were "largely disappointing." HANUSHEK & LINDSETH, *supra*, at 170.

In Kentucky and Wyoming, after 15 years of increases in expenditures, students were performing no better relative to the rest of the country—and in some cases, particularly those involving minorities, were performing worse—than in the period prior to the court-ordered remedy. HANUSHEK & LINDSETH, *supra*, at 151, 154, 157. In New Jersey, which spends more per pupil than any State in the country (roughly 60 percent higher than the average), student performance was not materially different at the end of the 15-year period than at the beginning. *Id.* at 162, 164-166. Only in Massachusetts, where the court-ordered increase in spending was coupled with structural reforms like rigorous academic standards, graduation tests, and accountability measures, was there evidence of marked improvement in student achievement. *Id.* at 169-170. Hanushek and Lindseth thus concluded that, "while court-ordered dollars have bought a host of services and facilities for schools[,] * * * these appear not to have generally bought the improved student performance so long sought and so urgently needed." *Id.* at 170.

These findings are not surprising. Studies have consistently found that *how* money is spent is much more important than *how much* money is spent. Increased spending—either through legislative efforts or through court-ordered funding remedies—is nothing more than window dressing on more fundamental problems impeding student performance. This is particularly true with respect to ELL programs—the type of program at issue in this case. Studies have shown that "state efforts to help local districts provide adequate programming opportunities for [ELL students] are often poorly conceived or applied," and "funding policies that are neither rational nor equitable" will not improve their performance. Bruce D. Baker & Paul L. Markham, *State School Funding Policies and Limited English Proficient Students*, 26 BILINGUAL RES. J. 659, 678 (2002). Rather than effecting genuine change, increased funding—in the ELL context and elsewhere—is likely to be a purely cosmetic remedy.

Yet courts have long pushed for increased spending on schools to remedy perceived constitutional and statutory violations, because the conventional wisdom has been that money is the key to success. Courts prefer financial remedies because they are simple to order, monitor, and enforce (most often through injunctive relief), and they do not require courts to become involved in the day-to-day operation of school systems. While courts are right to stay out of the business of school administration, students still lose when courts delve into appropriation decisions to redress problems at the state and local level.

If courts ignore structural problems in favor of more funding, the message States and school districts receive is that they can always get more money

no matter how they manage their schools. This is a perverse result. Without any incentive to take effective measures to improve student performance, most school systems do not make any meaningful changes—or, worse, funnel money away from the problems that need to be remedied.

"Will politics, ideologies, or the institutional structure of districts (including susceptibility to corruption) tend to divert money into paths and projects that do not advance student achievement?" Williamson M. Evers & Paul Clopton, *High-Spending, Low-Performing School Districts*, in COURTING FAILURE, *supra*, at 103, 105. The answer, unfortunately, is yes. Those who too often trumpet victory in school-funding cases—special interests and bureaucrats—continue the vicious cycle of input-based incentives: to capture as much money as possible for schools without any evidence of improvement in student achievement. See *id.* at 174, 176-178.

The type of funding remedy ordered in this case—a requirement that a certain amount of funds be earmarked for a particular program (here, ELL students), see 08-294 Pet. App. 64a-65a, 115a-116a, 186a-187a—can be particularly problematic, because school districts could rationally decide to keep ELL students languishing in the program and segregated from other students to ensure that funding for ELL programming does not diminish or disappear, see HANUSHEK & LINDSETH, *supra*, at 228. This is the exact opposite of the intent behind both the Equal Educational Opportunities Act of 1974, Pub. L. No. 93-380, tit. II, 88 Stat. 514, and the district court's remedial order: to integrate ELL students and provide them with the same educational opportunities afforded all students. See 20 U.S.C. § 1701(a).

Funding earmarked for particular programs also hamstrings legislatures and prevents them from exploring creative, meaningful reforms that are necessary to improve student performance.

B. Court-Ordered Remedies Should Afford States The Flexibility To Make Decisions About Inputs As Long As They Are Obtaining The Desired Outcomes

Because of their tendency to, in effect, throw money at education problems, courts do not have an impressive track record of improving student performance. For too long, courts have handicapped themselves by following antiquated thinking on education policy and attempting to fashion remedies that focus exclusively on measuring inputs to schools. Not only has this system proved unsuccessful; it has forced courts to stay involved in school-performance cases for many years and locked in ineffective programs, while restricting the options of States to develop better ones. Courts should play only a limited role in school administration and provide States and schools with the flexibility to craft solutions that focus on outcomes and accountability.

Courts are unsuited to addressing issues of education policy. Questions involving the administration of a school system—especially the proper disposition of state funds—are highly specialized, extraordinarily complex, and inherently political. State legislatures wrestle daily with such policy questions as the quality of education to provide their students, the level at which their citizens should be taxed to support public education, the portion of the state budget to allocate to schools, the reforms necessary to improve student performance, and the methods of

measuring such performance. See HANUSHEK & LINDSETH, *supra*, at 100.

Unlike state legislatures, courts have no particular experience or expertise in dealing with matters of education or budgetary policy. They also lack the necessary resources, such as staff and specialized committees to provide essential research and guidance on these complex issues. See HANUSHEK & LINDSETH, *supra*, at 139. As this Court has observed, federal judges' "lack of specialized knowledge and experience" therefore "counsels against premature interference with the informed judgments made at the state and local levels." *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 42 (1973); see also *Missouri* v. *Jenkins*, 515 U.S. 70, 131-132 (1995) (Thomas, J., concurring) ("Federal courts do not possess the capabilities of state and local governments in addressing difficult educational problems. State and local school officials not only bear the responsibility for educational decisions, they also are better equipped than a single federal judge to make * * * day-to-day policy, curricular, and funding choices * * *.").

In too many school-funding cases, courts act in ways that have a counterproductive effect on efforts to achieve equal and adequate education for all students. Courts most often order blanket increases in education funding as a remedy for the perceived causes of low student achievement. But this one-size-fits-all approach fails to take account of genuine geographic, demographic, and other differences among school districts. Indeed, even when funding is increased, "the amount spent on any one kind of student—say a non-English-speaking student—varies tremendously within a district depending on what

school the student attends." Marguerite Roza & Paul T. Hill, *How Can Anyone Say What's Adequate If Nobody Knows How Money Is Spent Now?*, in COURTING FAILURE, *supra*, at 235, 244; see *id.* at 243 (discussing court-ordered remedies and the problems that arise when funding increases "supposedly targeted to needy students are also distributed haphazardly"). Courts should recognize that there are many different causes of low achievement, and they should allow legislatures to find appropriately focused and cost-effective solutions to those problems—financial or otherwise. See Lindseth, *supra*, at 65-66.

Returning control of education policy to States and localities "allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs." *Bd. of Educ.* v. *Dowell*, 498 U.S. 237, 248 (1991). Court-ordered funding remedies, by contrast, do not provide state legislatures with the flexibility necessary to pursue alternative measures of educational reform. See Lindseth, *supra*, at 66. For ELL students in particular, it "is unlikely that there will be a one-size-fits-all policy solution to any school funding problem." Baker & Markham, *supra*, at 679. Instead, because of local differences, States should focus on creating a "set of frameworks for developing and adapting funding policies to various state contexts" and on monitoring "the effectiveness of those policies and practices toward achieving specific objectives." *Id.* at 678.

This is the core idea behind the prevailing approach to education policy. Research has taught that money alone does not improve performance. Rather, articulating clear objective standards, and requiring schools to meet the standards, is an essential element of promoting student achievement. The model

works. In this very case, Arizona looked at "objective measures of student performance," monitored the progress of underperforming schools, and began to see immediate results. See JA 199-201.

This movement toward accountability alters the incentives for States and school districts, but it is dependent on their ability to be flexible about the inputs and processes of education necessary to obtain the desired outcome of improved performance. In cases like this one, therefore, courts should recognize their limited ability to effectuate school reform and refrain from formulating bad education policy by simply ordering more funding as a remedy. Instead, upon a finding of liability, courts should ordinarily allow the parties broad latitude to propose their own remedies, and modification of remedies, with appropriate deference to state officials on policy issues. It is both inconsistent and ineffective to direct policies that set outcome goals and simultaneously constrain the inputs. Courts should focus on improving outcomes, not on legislating inputs.

C. NCLB Reflects The Consensus View That Focuses On Output Accountability In Education Policy

The enactment of NCLB provides clear evidence of the two-decade-long shift in thinking about education that has become central to policy in all States. Around 1990, a number of States began to define clear performance standards, introduce testing to measure student achievement, and hold schools accountable for the results. See Jennifer A. O'Day & Marshall S. Smith, *Systemic School Reform and Educational Opportunity*, in DESIGNING COHERENT EDUCATION POLICY 250, 250-252 (Susan H. Fuhrman ed. 1993). States that adopted these accountability

systems early showed faster achievement gains than those that delayed adopting them or never did so at all. See Eric A. Hanushek & Margaret E. Raymond, *Does School Accountability Lead to Improved Student Performance?*, 24 J. POL'Y ANALYSIS & MGMT. 297, 298, 309-310 (2005). In 2002, with the introduction of NCLB, Congress determined that federal education policy would embody the spirit of assessment and accountability in an effort to narrow achievement gaps and improve schools across the country. Further, there is evidence that student achievement, especially in lower grades, has improved since its passage. See CTR. ON EDUC. POL'Y, ANSWERING THE QUESTION THAT MATTERS MOST: HAS STUDENT ACHIEVEMENT INCREASED SINCE NO CHILD LEFT BEHIND? 1 (2007).

NCLB reflects Congress' considered judgment that educational reform should be focused on student performance and that, while States must be held accountable for the progress of their students in meeting NCLB's comprehensive standards, they should be allowed the flexibility to develop their own plans for meeting those goals. See 20 U.S.C. § 6812(9). The message to States—*requiring* results *begets* results—shifts the schools' incentives from obtaining as much money as possible to achieving better student performance. This shift benefits both kids and society.

Unlike court-ordered funding remedies, which measure success by how much money gets appropriated without examining whether needed structural reforms have been instituted, accountability for outputs—the federal standard in NCLB—turns attention to student achievement. The Act requires States receiving federal funds to adopt academic-outcome standards that its students must meet by 2014. See

20 U.S.C. § 6311(b)(2)(F). While 2014 is the deadline for overall student proficiency, schools must also show that they are making adequate yearly progress toward the goals. See 20 U.S.C. § 6311(b)(2)(B). And NCLB's required measurement of the performance of different subgroups, including minorities and ELL students, makes it easier to hold schools accountable for all of their students, including those in groups that have historically been left behind. See 20 U.S.C. § 6812(8).

On the basis of experience with its operation, specific aspects of NCLB may change when Congress re-authorizes the legislation. But there is little doubt that the underlying principle of accountability for student outcomes will remain. The focus on achievement, the insistence on transparency of performance by subgroups, and the altered incentives for improving student learning are now thoroughly ingrained in States and schools.

In addition to providing the flexibility and accountability not found in judicial oversight of school funding, NCLB corrects the division of power. The Act places the responsibility for education policy-setting where it belongs—in the legislative and executive branches (Congress and the United States Department of Education)—and places the responsibility for decisions about how to allocate resources where *it* belongs—in the state legislatures.

While NCLB is not perfect, it does reflect sound education policy, and its testing requirements provide a powerful mechanism for holding schools accountable while providing States with the needed flexibility to decide how to obtain results. NCLB offers a way to evaluate the progress of schools under various scenarios. In some—perhaps even many—

cases, States and localities may need more money to meet NCLB's standards. Primarily, though, States will have to address a wide range of problems, both inside and outside the schools, and they will have to do so by developing new and innovative measures, such as stronger accountability systems, charter schools, vouchers, and more effective means of compensating teachers. See HANUSHEK & LINDSETH, *supra*, at 264.

Congress decided that NCLB's output focus is the way to evaluate whether States are making meaningful progress. Courts should not ignore that decision and measure how much money States spend instead. States might struggle to meet standards. But given the failure of past policies keyed to inputs and resources, and the proven effectiveness of standards, accountability, and outcomes, States must be allowed to determine for themselves how to reform their education and finance policies.

That is precisely what Nogales, the school district at the heart of this dispute, attempted to do—and it appears that it was largely successful. Nogales instituted structural reforms to eliminate waste and mismanagement, implemented programs to monitor student achievement, and developed ways to use funding more efficiently. See 08-294 Pet. Br. 45-46 (reciting evidence from 2007 evidentiary hearing). Even the Ninth Circuit acknowledged that Nogales had made "significant strides" as a result of its structural and managerial improvements. 08-294 Pet. App. 34a. And *amici* have no reason to doubt that this improvement will continue. This Court should allow Nogales and the entire State of Arizona to continue to develop their own outcome-based methods of improving student performance without

restricting their flexibility through court-ordered funding remedies.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

STEPHEN M. SHAPIRO
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600

DAN HIMMELFARB
Counsel of Record
SCOTT A. CLAFFEE
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Amici Curiae

FEBRUARY 2009

AMICUS CURIAE BRIEF

No. 08-294
(consolidated with No. 08-289)

IN THE

Supreme Court of the United States

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES AND PRESIDENT OF THE ARIZONA SENATE,

Petitioners,

v.

MIRIAM FLORES, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF EDUCATIONAL POLICY AND FINANCE SCHOLARS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

JONATHAN L. MARCUS
Counsel of Record
GREGORY M. LIPPER
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-6000

Counsel for Amici Curiae

March 2009

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. THE VIEW OF PETITIONERS' SCHOLARS DOES NOT REFLECT A "CONSENSUS," AND THE IMPORTANCE OF EDUCATIONAL FUNDING IS DEMONSTRATED BY A SUBSTANTIAL AND GROWING BODY OF RESEARCH 5

A. Research Demonstrates That Adequate Funding Is Essential To Improving Student Performance 6

B. No Child Left Behind Underscores The Importance Of School Funding. 12

II. THE ARGUMENT OF PETITIONERS' SCHOLARS IS BASED ON RESEARCH THAT IS UNRELIABLE OR TAKEN OUT OF CONTEXT. 14

A. Petitioners' Scholars Unduly Rely On The Flawed Work Of Eric Hanushek. 15

B. Petitioners' Scholars Improperly Rely on a Forthcoming, Unpublished Study, Which They Refuse to Share With The Undersigned Amici. 19

C. Petitioners' Scholars Incorrectly Claim Support From The Work of Baker And Markham, Both Of Whom Have Joined This Brief. 22

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Abbott v. Burke, 575 A.2d 359 (N.J. 1990) 21

Abbott v. Burke, 710 A.2d 82 (N.J. 1998) 20

Campaign for Fiscal Equality v. State, 801 N.E.2d 326 (N.Y. 2003) 18

Campbell County School District v. State, 907 P.2d 1238 (Wyo. 1995) 20

McDuffy v. Secretary of the Executive Office of Education, 615 N.E.2d 516 (Mass. 1993) 20

Montoy v. State, No. 99-C-1738, 2003 WL 22902963 (Kan. Dist. Ct. Dec. 2, 2003) 19

Opinion of the Justices, 624 So. 2d 107 (Ala. 1993) 19

State v. Campbell County School District, 19 P.3d 518 (Wyo. 2001) 20

State v. Campbell County School District, 32 P.3d 325 (Wyo. 2001) 20

Other Authorities

Daniel Aaronson et al., *Teachers and Student Achievement in the Chicago Public High Schools* (Fed. Reserve Bank of Chi., Working Paper No. 2002-28, 2003), *available at* http://www.chicagofed.org-/publications/workingpress/papers/wp2002-28.pdf. 6

John Augenblick & John Meyers, *Calculation of the Cost of an Adequate Education in Maryland in 1999–2000 Using Two Different Analytic Approaches* (2001), *available at* http://www.schoolfunding.info /states/md/MarylandAdequacyStudy.pdf.....9

Bruce D. Baker et al., *Legal and Empirical Analysis of State Financing of Programs for Children with English Language Communication Barriers* (Spring 2004) (unpulished manuscript), *available at* http://web.ku.edu/~bdbaker/index_files/ page0002.htm.....10

Bruce D. Baker & Paul L. Markham, *State School Funding Policies and Limited English Proficient Students*, 26 Bilingual Res. J. 659 (2002).....22, 23

Donald Boyd et al., *The Preparation and Recruitment of Teachers: A Labor-Market Freamework, in A Qualified Teacher in Every Classroom? Appraising Old Answers and New Ideas* 149 (Frederick M. Hess et al. eds, 2004).....7

David Card & Alan B. Krueger, *Does School Quality Matter? Returns to Education and the Characteristics of Public Schools in the United States*, 100 J. Pol. Econ. 1 (1992).....7

David Card & A. Abigail Payne, *School Finance Reform, The Distribution of School Spending, and the Distribution of Student Test Scores*, 83 J. Pub. Econ. 49 (2002).....11

Julie Berry Cullen & Randall Reback, *Tinkering Towards Accolades: School Gaming Under a Performance Accountability System, in Improving School Accountability* 1 (Timothy J. Gronberg & Dennis W. Jansen eds., 2006) 13

Linda Darling-Hammond, *From "Separate But Equal" to "No Child Left Behind": The Collision of New Standards and Old Inequalities, in Many Children Left Behind* 3 (Deborah Meier & George Wood eds., 2004) 13

Linda Darling-Hammond, *New Standards and Old Inequities: School Reform and the Education of African-American Students*, 69 J. Negro Educ. 263 (2000) 6

John Deke, *A Study of the Impact of Public School Spending on Postsecondary Educational Attainment Using Statewide School District Financing in Kansas*, 22 Econ. Educ. Rev. 275 (2003) 10

William Driscoll & Howard Fleeter, *Projected Costs of Implementing the Federal "No Child Left Behind Act" in Ohio* (Levin, Driscoll, & Fleeter, Columbus, OH), 2003 13

William D. Duncombe et al., *Dollars Without Sense: The Mismatch Between No Child Left Behind Act Accountability and Title I Funding, in Improving on No Child Left Behind: Getting Education Reform Back on Track* 19 (Richard Kahlenberg ed., 2008) 14

William Duncombe & John Yinger, *How Much More Does a Disadvantaged Student Cost?* 24 Econ. Educ. Rev. 513 (2005) 9

Ronald F. Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters*, 28 Harv. J. on Legis. 465 (1991) 8

Jeremy D. Finn et al., *The Enduring Effects of Small Classes*, 103 Tchrs. C. Rec. 145 (2001) 8

Janie E. Funkhouser et al., *A Research Review: The Educational Uses of Time*, 4 Stud. Educ. Reform (Pol'y Stud. Assocs., Inc., Washington, DC), 1995 9

Maribeth Gettinger, *Time Allocated and Time Spent Relative to Time Needed for Learning as Determinants of Achievement*, 77 J. Educ. Psychol. 3 (1985) 9

Margaret E. Goertz & Michael Weiss, *Assessing Success in School Finance Litigation: The Case of New Jersey* (Oct. 4, 2007) (unpublished manuscript), *available at* http://devweb.tc.columbia.edu/manager/symposium/Files/111_goertz_NJ_case_study_draft%20_10.04.07_.pdf 11

Rob Greenwald et al., *The Effect of School Resources on Student Achievement*, 66 Rev. Educ. Res. 361 (1996) 16, 17

Jonathan Guryan, *Does Money Matter? Regression-Discontinuity Estimates from Education Finance Reform in Massachusetts* (Nat'l Bureau of Econ. Research, Working Paper No. 8269, 2001), *available at* http://www.nber.org/papers/w8269.....10

Eric A. Hanushek, *When School Finance "Reform" May Not Be Good Policy*, 28 Harv. J. on Legis. 423 (1991) 15

Eric A. Hanushek & Alfred A. Lindseth, *Schoolhouses, Courthouses and Statehouses: Solving the Funding-Achievement Puzzle in America's Public Schools* (forthcoming May 2009) 19

Larry V. Hedges et al., *Does Money Matter? A Meta-Analysis of Studies of the Effects of Differential School Inputs on Student Outcomes*, 23 Educ. Res. 5 (1994).....16

G. Alfred Hess, Jr., *Understanding Achievement (And Other) Changes Under Chicago School Reform*, 21 Educ. Eval. & Pol'y Analysis 67 (1999) 10

Jennifer Imazeki, *Assessing the Costs of K-12 Education in California's Public Schools*, 3 Educ. Fin. & Pol'y 90 (2008) 9

Jennifer Imazeki & Andrew Reschovsky, *Does No Child Left Behind Place a Fiscal Burden on States? Evidence From Texas*, 1 Educ. & Fin. Pol'y 217 (2006) 12

Richard D. Kahlenberg, *Introduction* to *Improving on No Child Left Behind: Getting Education Reform Back on Track* 1 (Richard Kahlenberg ed., 2008).....12

Alan B. Krueger, *Understanding the Magnitude and Effect of Class Size on Student Achievement, in The Class Size Debate* (Lawrence Mishel & Richard Rothstein eds., 2002).....16, 17, 18

Susanna Loeb & Marianne E. Page, *Examining the Link Between Teacher Wages and Student Outcomes: The Importance of Alternative Labor Market Opportunities and Non-Pecuniary Variation*, 82 Rev. Econ. & Stat. 393 (2000).....8

William J. Mathis, *The Cost of Implementing the Federal No Child Left Behind Act: Different Assumptions, Different Answers*, 80 Peabody J. Educ. 90 (2005).....12

Richard J. Murnane & Randall J. Olsen, *The Effects of Salaries and Opportunity Costs on Length of Stay in Teaching: Evidence from North Carolina*, 25 J. Hum. Resources 106 (1990).....7

National Center for Education Statistics, U.S. Department of Education, *NAEP Inclusion Policy: Inclusion of Special-Needs Students*, http://nces.ed.gov/nationsreportcard/about/inclusion.asp (last visited Mar. 24, 2009).....21

National Center for Education Statistics, U.S. Department of Education, *The Nation's Report Card: History of State Participation, 1990–1998*, http://nces.ed.gov/nationsreportcard/about/statehistorypublic.asp (last visited Mar. 24, 2009) 21

National Center for Education Statistics, U.S. Department of Education, NCES 2007-494, *The Nation's Report Card: Mathematics 2007* (2007), *available at* http://nces.ed.gov/nationsreportcard/pdf/main2007/2007494.pdf 22

National Center for Education Statistics, U.S. Department of Education, NCES 2007-496, *The Nation's Report Card: Reading 2007* (2007), *available at* http://nces.ed.gov/nationsreportcard/pdf/main2007/2007496.pdf 21

Tom Parrish, *A Cost Analysis of Alternative Instructional Models for Limited English Proficient Students in California*, 19 J. Educ. Fin. 256 (1994) 9

Public Advocate of the City of New York & Advocates for Children, *Pushing Out At-Risk Students: An Analysis of High-School Discharge Figures* (2002), *available at* http://www.advocatesforchildren.org/pubs/2005/discharge.pdf 13

Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. Rev. 1467 (2007) 15, 18

Steven G. Rivkin et al., *Teachers, Schools and Academic Achievement*, 73 Econometrica 417 (2005) 7

Jonah E. Rockoff, *The Impact of Individual Teachers on Student Achievement: Evidence from Panel Data*, 94 Am. Econ. Rev. 247 (2004).....6

George Wood, *A View from the Field: NCLB's Effect on Classrooms and Schools*, *Many Children Left Behind* 33 (Deborah Meier & George Wood eds., 2004).....13

INTEREST OF AMICI CURIAE

Amici are twenty-three prominent scholars and researchers in education policy, finance, and economics.[1] They submit this brief to advise the Court that a brief filed by certain education-policy scholars in support of Petitioners—which argues that sound education policy focuses on measuring results, without regard to resource inputs—does not represent a consensus view. The Court should be aware both of methodological limitations in the studies cited by Petitioners' scholars and of contrary empirical research that goes unmentioned in their brief. More generally, amici submit this brief to stress that sustained educational achievement depends not only on clear goals and effective programs, but also on adequate resources.

The brief is joined by the following experts:

Jamal Abedi is a Professor at the School of Education at the University of California, Davis.

Bruce Baker is an Associate Professor at the Graduate School of Education at Rutgers University.

William Duncombe is a Professor of Public Administration at Syracuse University.

---

[1] Each party has consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

Patricia Gandara is a Professor at the Graduate School of Education and Information Studies, University of California, Los Angeles.

Margaret Goertz is a Professor at the Graduate School of Education at the University of Pennsylvania.

Claude Goldenberg is a Professor at the Stanford University School of Education.

Jay Heubert is a Professor of Law and Education at Teachers College, Columbia University.

Henry Levin is the William Heard Kilpatrick Professor of Economics and Education at Teachers College, Columbia University and the David Jacks Professor Emeritus of Higher Education and Economics at the Stanford University School of Education.

George Madaus is the Boisi Professor of Education and Public Policy, Emeritus at Boston College.

Paul Markham is an Associate Professor at the University of Kansas School of Education.

Linda McSpadden McNeil is a Professor of Education at Rice University.

Martha Minow is the Jeremiah Smith, Jr. Professor at Harvard Law School and a Lecturer at the Harvard Graduate School of Education.

Gary Orfield is a Professor of Law, Urban Planning, Political Science, and Education at the

Graduate School of Education & Information Studies, University of California, Los Angeles.

Michael A. Rebell is a Professor of Law and Educational Practice at Teachers College, Columbia University.

Robert Rueda is a Professor of Education at the University of Southern California.

Russell W. Rumberger is a Professor of Education at the University of California, Santa Barbara.

Carola Suarez-Orozco is a Professor of Applied Psychology at New York University, Steinhardt School of Culture, Education, and Human Development.

Marcelo M. Suarez-Orozco is the Courtney Sale Ross University Professor of Globalization and Education at New York University.

Gail Sunderman is the Director of the Mid-Atlantic Equity Center at George Washington University.

Angela Valenzuela is an Associate Professor at the College of Education at the University of Texas, Austin.

Amy Stuart Wells is a Professor of Sociology and Education at Teachers College, Columbia University.

Kevin Welner is an Associate Professor at the University of Colorado at Boulder School of Education.

John Yinger is the Trustee Professor of Public Administration and Economics at Syracuse University.

SUMMARY OF ARGUMENT

Petitioners' amici scholars assert that courts should not order states to increase educational funding and contend (p.5) that their position reflects "the consensus view of education-policy experts." The educational literature does not support their claim.

First, a growing body of empirical research confirms that adequate funding is integral to student achievement, and that funding increases—including increases ordered by courts—have led to substantial improvements in student performance. The federal No Child Left Behind Act ("NCLB") underscores the importance of adequate funding for education. In many states, meeting the new standards will require significant funding increases; attempting to meet the standards without funding increases may actually cause students harm.

Second, the research relied upon by Petitioners' scholars is either methodologically suspect or taken out of context. Most of the sources are authored or edited by Eric A. Hanushek, whose methodology and conclusions have been routinely criticized by both other scholars and the courts. The principal source relied upon is neither published nor public, yet Peti-

tioners' amici will not share the manuscript with the undersigned amici. Petitioners' amici also misplace reliance on the research of two additional authors, who have joined this brief in support of Respondents.

ARGUMENT

I. THE VIEWS OF PETITIONERS' SCHOLARS DO NOT REFLECT A "CONSENSUS," AND THE IMPORTANCE OF EDUCATIONAL FUNDING IS DEMONSTRATED BY A SUBSTANTIAL AND GROWING BODY OF RESEARCH.

Petitioners' scholars argue (p.7) that "[t]here is scant evidence that past judicial actions concerning school finance have had any beneficial effect on student performance." Although they do not purport to be familiar with the facts of this case, Petitioners' scholars predict (p.4) that the court-ordered funding in this case "is destined to fail."

The argument of Petitioners' scholars does not reflect "the consensus view," as they claim (p.5). In fact, the view of Petitioners' scholars is contradicted by a significant and growing body of empirical research. This research recognizes that, although funding alone will not guarantee students' success, inadequate funding ensures their failure.

A. Research Demonstrates That Adequate Funding Is Essential To Improving Student Performance.

Although we do not suggest that money alone will improve children's education, even the best designed and executed programs require sufficient resources. An overwhelming body of research illustrates that adequate funding is necessary to student achievement and that increasing funding improves student performance.

1. There is little dispute that programs and policies that improve student outcomes require adequate resources to execute. Even the most rigorous standards will not improve performance unless supported by the resources necessary to meet those standards. *See* Linda Darling-Hammond, *New Standards and Old Inequities: School Reform and the Education of African-American Students*, 69 J. Negro Educ. 263, 264 (2000) ("[S]tandards and tests alone will not improve schools or create educational opportunities where they do not now exist.").

Perhaps most importantly, more resources lead to better teachers, which in turn lead to better student performance. Economists have long documented that high-quality teachers are essential to student achievement. *See, e.g.*, Jonah E. Rockoff, *The Impact of Individual Teachers on Student Achievement: Evidence from Panel Data*, 94 Am. Econ. Rev. 247, 247–48 (2004); Daniel Aaronson et al., *Teachers and Student Achievement in the Chicago Public High Schools* 1–2 (Fed. Reserve Bank of Chi., Working Paper No. 2002-28, 2003), *available at*

http://www.chicagofed.org/publications/workingpress/papers/wp2002-28.pdf. Even Petitioners' scholars recognize that good teachers "matter importantly for student achievement." Steven G. Rivkin et al., *Teachers, Schools and Academic Achievement*, 73 Econometrica 417, 449 (2005).

An array of research demonstrates that increased funding leads to better teachers and better outcomes for students:

- There is a statistically significant link between teachers' salaries and students' future earnings. *See* David Card & Alan B. Krueger, *Does School Quality Matter? Returns to Education and the Characteristics of Public Schools in the United States*, 100 J. Pol. Econ. 1, 3 (1992).

- Higher salaries lead teachers to stay in the profession longer. *See* Donald Boyd et al., *The Preparation and Recruitment of Teachers: A Labor-Market Framework, in A Qualified Teacher In Every Classroom? Appraising Old Answers and New Ideas* 149, 158 (Frederick M. Hess et al. eds., 2004); Richard J. Murnane & Randall J. Olsen, *The Effects of Salaries and Opportunity Costs on Length of Stay in Teaching: Evidence from North Carolina*, 25 J. Hum. Resources 106, 106–07 (1990).

- Economists have concluded that "raising the wages of teachers by 50% will reduce high-school dropout rates by more than 15% and increase college enrollment rates by approximately 8%." Susanna Loeb & Marianne E. Page, *Examining*

the Link Between Teacher Wages and Student Outcomes: The Importance of Alternative Labor Market Opportunities and Non-Pecuniary Variation, 82 Rev. Econ. & Stat. 393, 393 (2000).

Higher salaries are especially critical to attracting teachers to poorer districts, given that most teachers "prefer higher-socioeconomic-status districts." Ronald F. Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters*, 28 Harv. J. on Legis. 465, 466 (1991). In this case, the Nogales district "cannot afford to pay market rate salaries" for qualified English Language Learner (ELL) teachers. Pet. App. 66a. As a result, the district must use long-term substitutes or instructors with "emergency" certification. Pet. App. 36a.

Other inputs also demonstrably improve student performance. For instance, smaller class sizes in elementary schools produce long-term improvements in student learning. *See, e.g.*, Jeremy D. Finn et al., *The Enduring Effects of Small Classes*, 103 Tchrs. C. Rec. 145, 174 (2001) (extensive controlled longitudinal study of over 6,300 students in 325 classes in 79 schools demonstrated that students in smaller classes had statistically significant differences in achievement and that differences endured over many years). But without adequate resources, smaller classes come at the expense of teacher quality.

Similarly, longer school days and school years improve student performance. *See, e.g.*, Maribeth Gettinger, *Time Allocated and Time Spent Relative to Time Needed for Learning as Determinants of Achievement*, 77 J. Educ. Psychol. 3, 4 (1985). Yet the

cost of extending the school day and school year is one of the primary reasons that more districts have not done so. *See* Janie E. Funkhouser et al., *A Research Review: The Educational Uses of Time*, 4 Stud. Educ. Reform (Pol'y Stud. Assocs., Inc., Washington, DC), 1995, at 7.

The education of ELL students requires even more resources than does the education of students who are proficient in English. *See, e.g.*, Jennifer Imazeki, *Assessing the Costs of K-12 Education in California's Public Schools*, 3 Educ. Fin. & Pol'y 90, 100 (2008) (74 percent more resources); William Duncombe & John Yinger, *How Much More Does a Disadvantaged Student Cost?*, 24 Econ. Educ. Rev. 513, 523 (2005) (101 to 142 percent more resources); John Augenblick & John Meyers, *Calculation of The Cost of An Adequate Education in Maryland in 1999-2000 Using Two Different Analytic Approaches* 17-18 (2001), *available at* http://www.schoolfunding.info-/states/md/MarylandAdequacyStudy.pdf (double the resources). Among other things, ELL students require additional teacher time and language aides. *See* Tom Parrish, *A Cost Analysis of Alternative Instructional Models for Limited English Proficient Students in California*, 19 J. Educ. Fin. 256, 263 (1994).

For example, in a recent study "panels of education experts . . . consistently indicate[d] that elementary and secondary level [ELL] children require additional personnel at rates of approximately 20 [ELL] children per full time teacher with 1 or more instructional aides per teacher." Bruce D. Baker et al., *Legal and Empirical Analysis of State Financing*

of Programs for Children with English Language Communication Barriers 12 (Spring 2004) (unpublished manuscript), *available at* http://web.ku.edu/~bdbaker/index_files/page0002.htm. In this case, the Nogales superintendent considers additional tutors and teacher aides to be "essential," yet Nogales cannot afford them. J.A. 225.

2. Unsurprisingly, then, research demonstrates that increases in school funding improve student performance. *See, e.g.*, Jonathan Guryan, *Does Money Matter? Regression-Discontinuity Estimates from Education Finance Reform in Massachusetts* 21 (Nat'l Bureau of Econ. Research, Working Paper No. 826921, 2001), http://www.nber.org/papers/w8269 (increases in per-pupil spending led to significant increases in math, reading, science, and social studies test scores for 4th-grade students).[2]

For instance, a 2002 peer-reviewed study in the *Journal of Public Economics* measured the impact of court-ordered funding increases in twelve states during the 1980s. The study pooled samples of 100,000

---

[2] *See also, e.g.*, John Deke, *A Study of the Impact of Public School Spending on Postsecondary Educational Attainment Using Statewide School District Financing in Kansas*, 22 Econ. Educ. Rev. 275, 276 (2003) (regression analysis demonstrates that spending increases significantly increased probability of students obtaining postsecondary education); G. Alfred Hess, Jr., *Understanding Achievement (And Other) Changes Under Chicago School Reform*, 21 Educ. Eval. & Pol'y Analysis 67, 78 (1999) (successful principals unanimous in their opinion that adequate funding made their improvement planning "meaningful," by allowing "resources to be put behind program decisions").

individual SAT scores drawn from the 48 contiguous states for each year from 1978 to 1992. Comparing the states under court orders with those that were not, the study concluded that court-ordered funding for underperforming districts had "an equalizing effect . . . on the test score outcomes for children from different family background groups" and "closed the gap in average SAT scores between children of highly-educated and poorly-educated parents by . . . roughly 5 percent." David Card & A. Abigail Payne, *School Finance Reform, The Distribution of School Spending, and the Distribution of Student Test Scores*, 83 J. Pub. Econ. 49, 67, 80 (2002).

A 2007 study highlighted similar gains following court-ordered funding increases in New Jersey. The study analyzed the state's official education assessments and the U.S. Department of Education's National Center for Education Statistics, which compared urban students, most of whom were covered by the court decree, and other categories of students in the state. This analysis demonstrated that funding increases ordered in 1998 for the urban students significantly improved their performance from 1999 to 2005. As a result of the court-ordered funding, "there was significant closure in the achievement gap between the [subject] districts and the rest of the state." Margaret E. Goertz & Michael Weiss, *Assessing Success in School Finance Litigation: The Case of New Jersey* (Nov. 12, 2007) (unpublished manuscript), *available at* http://devweb.tc.columbia.edu/manager/symposium/Files/111_goertz_NJ_case_study_draft%20_10.04.07_.pdf.

B. No Child Left Behind Underscores The Importance Of School Funding.

Although Petitioners' scholars acknowledge (p.17) that "States and localities may need more money to meet NCLB's standards," they argue that NCLB signals that courts should not "measure how much money States spend." Far from downplaying the importance of adequate inputs, however, NCLB underscores the importance of ensuring that states provide schools with adequate resources.

No Child Left Behind has not obviated the need to ensure that schools are adequately funded. The theory underlying NCLB was "greater funding *in exchange* for stricter accountability for results." Richard D. Kahlenberg, *Introduction* to *Improving on No Child Left Behind: Getting Education Reform Back on Track* 1, 5 (Richard Kahlenberg ed., 2008) (emphasis added). Experts recognize that states cannot meet NCLB standards without resources. *See, e.g.*, William J. Mathis, *The Cost of Implementing the Federal No Child Left Behind Act: Different Assumptions, Different Answers*, 80 Peabody J. Educ. 90, 105 (2005). Research, including research commissioned by states, underscores that meeting NCLB standards will require significant increases in funding. *See, e.g.*, Jennifer Imazeki & Andrew Reschovsky, *Does No Child Left Behind Place a Fiscal Burden on States? Evidence From Texas*, 1 Educ. & Fin. Pol'y 217, 238 (2006) (Texas must spend between $1.4 billion and $4 billion to meet standards imposed by NCLB); William Driscoll & Howard Fleeter, *Projected Costs of Implementing the Federal "No Child Left Behind Act" in Ohio* (Levin, Driscoll,

& Fleeter, Columbus, OH), 2003, at 60 (study prepared for the Ohio Department of Education estimates that NCLB will lead to additional annual costs of $1.4 billion).

When states try to meet NCLB standards without the necessary increases in funding, they create perverse incentives for schools and harm to students. Inadequate resources create incentives to refuse admittance to students with low test scores or special needs for fear of lowering the school's overall scores and stretching its resources further. *See, e.g.*, Julie Berry Cullen & Randall Reback, *Tinkering Towards Accolades: School Gaming Under a Performance Accountability System, in Improving School Accountability* 1, 2–3 (Timothy J. Gronberg & Dennis W. Jansen eds., 2006); Pub. Advocate of the City of New York & Advocates for Children, *Pushing Out At-Risk Students: An Analysis of High-School Discharge Figures* 6 (2002). The incentive to refuse admittance is particularly detrimental to non-English speaking students, who generally require more services. *See* Linda Darling-Hammond, *From "Separate But Equal" to "No Child Left Behind": The Collision of New Standards and Old Inequalities, in Many Children Left Behind* 3, 14 (Deborah Meier & George Wood eds., 2004); George Wood, *A View from the Field: NCLB's Effect on Classrooms and Schools, in Many Children Left Behind, supra*, at 33, 47.

Demanding outputs without sufficient inputs also encourages shortcuts and generally deflates teacher morale and student performance. Scholars observe that "[w]hen the expectations in an accountability system are so unreasonable, they undermine

morale, encourage cheating, and are generally not effective." William D. Duncombe et al., *Dollars Without Sense: The Mismatch Between No Child Left Behind Act Accountability and Title I Funding, in Improving on No Child Left Behind, supra*, at 19, 72–73.

On the other hand, Petitioners' scholars cite no evidence to support their supposition (p.10) that increased funding will encourage school districts to "keep ELL students languishing in the program and segregated from other students to ensure that funding for ELL programming does not diminish or disappear." If anything, it is inadequate funding that leaves students languishing. In the underfunded Nogales district, for instance, the average student needed four to five years to become proficient, over twice as long as contemplated by the Arizona legislature. Pet. App. 108a.

II. THE ARGUMENT OF PETITIONERS' SCHOLARS IS BASED ON RESEARCH THAT IS UNRELIABLE OR TAKEN OUT OF CONTEXT.

The brief of Petitioners' scholars is only as good as the scholarship on which it relies. Yet the scholarship on which their brief depends either suffers from serious methodological flaws or is taken out of context.

First, Petitioners' amici rely overwhelmingly on a single writer, Eric A. Hanushek, whose research has been called into question by both commentators and courts. Among other criticisms, Hanushek's scholar-

ship has been "widely challenged as being simplistic and misleading." Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. Rev. 1467, 1480 (2007).

Second, Petitioners' amici rely heavily on a Hanushek-authored study that is not yet public—and which Petitioners' amici have refused to share with the undersigned amici.

Third, Petitioners' amici misplace reliance on the research by authors other than Hanushek. Indeed, two of the authors on which Petitioners' scholars rely have joined this amicus brief in support of Respondents.

A. Petitioners' Scholars Unduly Rely On The Flawed Work Of Eric Hanushek.

Of the eight secondary authorities cited by Petitioners' scholars, five have been edited or co-authored by Eric A. Hanushek, a signatory to the brief. Hanushek has long maintained: "*There is no systematic relationship between school expenditures and student performance.*" Eric A. Hanushek, *When School Finance "Reform" May Not Be Good Policy*, 28 Harv. J. on Legis. 423, 425 (1991). But Hanushek's position contradicts the most rigorous empirical research.

1. Hanushek bases his conclusions on unreliable syntheses of prior studies. His results "depend crucially on the *peculiar way* in which he combines the many studies in the literature." Alan B. Krueger,

Understanding the Magnitude and Effect of Class Size on Student Achievement, in The Class Size Debate 7, 8 (Lawrence Mishel & Richard Rothstein eds., 2002) (emphasis added). His method of synthesis—which scholars describe as "vote counting"—is "known to be a rather insensitive procedure for summarizing results" and "is now rarely used in areas of empirical research where sophisticated syntheses of research are expected." Rob Greenwald et al., *The Effect of School Resources on Student Achievement*, 66 Rev. Educ. Res. 361, 362 (1996). The weakness of Hanushek's methodology is profound: as the number of studies to be synthesized increases, the "probability that a vote count will correctly detect an effect that is present in every study tends to zero." Larry V. Hedges et al., *Does Money Matter? A Meta-Analysis of Studies of the Effects of Differential School Inputs on Student Outcomes*, 23 Educ. Res. 5, 13 (1994).

After scrutinizing his work, other economists have concluded that Hanushek's data "support exactly the opposite conclusion." *Id.* at 5.

First, scholars from the University of Chicago have performed meta-analyses of the studies that Hanushek reviewed as well as of additional studies that Hanushek did not consider. After correcting the methodological errors that affected Hanushek's analysis, the authors found that "the data he assessed on the relations between school resource inputs and student outcomes, including achievement, were substantially more consistent and positive than [Hanushek] believed." Greenwald, *supra*, at 362. This rigorous review of Hanushek's data concluded

that "money is positively related to student achievement." *Id.* at 385.

Second, Princeton University economist Alan Krueger analyzed the literature reviews used by Hanushek to support his conclusion that increased resources, including smaller class sizes, do not improve student performance. According to Krueger, "Hanushek's pessimistic conclusion about the [effectiveness of increasing inputs] results in part from the fact that he inadvertently places disproportionate weight on studies that are based on smaller samples." Krueger, *supra*, at 8.[3] As a result, "Hanushek's selection criteria have the effect of biasing his representation of the literature toward finding zero or negative effect of class size on performance." *Id.* at 16. When this anomaly is corrected, and when "the various studies in Hanushek's sample are accorded equal weight, *class size is systematically related to student performance.*" *Id.* at 9 (emphasis in original).

---

[3] Specifically, Hanushek "uses a selection rule that would take more estimates from studies that analyzed subsamples of a larger dataset than from studies that used the full sample of a larger dataset." *Id.* at 8–9. For example, "if one study analyzed a pooled sample of third through sixth graders, it would generate a single estimate, whereas if another study using *the same data* analyzed separate subsamples of third graders, fourth graders, fifth graders, and sixth graders, that study would generate four estimates." *Id.* at 9 (emphasis in original). Moreover, "if the study further estimated separate regressions for math and reading scores for each subsample, as opposed to the average test score, it would yield 24 estimates." *Id.* Ultimately, "the lion's share of Hanushek's 277 estimates were extracted from a small minority of the 59 studies." *Id.*

The same flaws compromise Hanushek's research about the effect of resources more generally. "As with his class size studies, Hanushek [in his resources-based studies] extracted more estimates from studies that tended to find insignificant or negative effects of expenditures per student and fewer from studies that found positive effects." *Id.* at 21. If a proper methodology is employed, "*the opposite conclusion is more accurate*: unless one weighs the studies of school resources in peculiar ways, the *average study* tends to find that more resources are associated with greater student achievement." *Id.* (first emphasis added).

2. Courts too have identified serious flaws in Hanushek's work. For years, Hanushek has testified as a defense witness in school-funding lawsuits in state courts. *See, e.g., Campaign for Fiscal Equal. v. State*, 801 N.E.2d 326, 334–35 (N.Y. 2003) (Hanushek's testimony "failed to rebut" the conclusion that "smaller class sizes in the earliest grades correlate with better test results during those years and afterwards."). Of the eleven cases in which he has testified, Hanushek has been on the losing side in nine of them. *See* Rebell, *supra*, at 1485 n.82.

Courts have identified serious limitations in Hanushek's research. In one case, the court observed that Hanushek reviewed student achievement in only a single year rather than over time; controlled insufficiently for "variables that could affect student scores[,] such as race, socio-economic status, and parental education"; and included in his calculations spending on ancillary items such as "maintenance, school lunch, and transportation." *Opinion of the*

Justices, 624 So. 2d 107, 140 (Ala. 1993). Even with these flaws, when Hanushek's data were reanalyzed "using actual rather than average test scores, [there was] *a statistically significant positive correlation* between expenditures and achievement." *Id.* at 140 n.34 (emphasis added).

When pressed, Hanushek himself acknowledges the importance of school funding. In one case, Hanushek "was billed as the expert who would demonstrate that 'money doesn't matter.'" *Montoy v. State*, No. 99-C-1738, 2003 WL 22902963, at *49. (Kan. Dist. Ct. Dec. 2, 2003). But Hanushek ultimately acknowledged that "money spent wisely, logically, and with accountability would be very useful indeed." *Id.* He further agreed: "Only a fool would say money doesn't matter." *Id.*

B. Petitioners' Scholars Improperly Rely on a Forthcoming, Unpublished Study, Which They Refuse to Share With The Undersigned Amici.

The work most frequently cited by Petitioners' scholars is Eric A. Hanushek & Alfred A. Lindseth, *Schoolhouses, Courthouses and Statehouses: Solving the Funding-Achievement Puzzle in America's Public Schools* (forthcoming May 2009). In this study, which Petitioners' scholars cite ten times, Hanushek and his coauthor purport (pp.7–8) to have "examined the performance of students in four States—Kentucky, Massachusetts, New Jersey, and Wyoming—that experienced extraordinary funding increases as a result of court-ordered remedies." They assert (p.8) that "relative to the rest of the Nation,

the results in three of the four States were 'largely disappointing.'"

This work is not publicly available. Petitioners' amici have not placed this unpublished work on file with the Clerk of this Court or with the Court's library. Yet counsel for Petitioners' amici informed the undersigned that Hanushek would not authorize the draft to be shared with Respondents' amici.

Without access to Hanushek's unpublished work, it is impossible for amici or the Court to evaluate Hanushek's empirical claims. What little we do know, however, suggests that this forthcoming analysis suffers from methodological flaws and in any event does not support its authors' conclusions. The unpublished study apparently focuses on statewide scores on the National Assessment of Educational Progress ("NAEP") over a period of fifteen years, from 1992–2007, the latest year for which NAEP scores are available. If the study does so, it faces the following methodological limitations:

- The major state court funding decisions in three of the four states (Massachusetts, New Jersey and Wyoming) were not issued and fully implemented until after 1992. *See State v. Campbell County Sch. Dist.*, 32 P.3d 325 (Wyo. 2001); *State v. Campbell County Sch. Dist.*, 19 P.3d 518 (Wyo. 2001); *Abbott v. Burke*, 710 A.2d 82 (N.J. 1998); *Campbell County Sch. Dist. v. State*, 907 P.2d 1238 (Wyo. 1995); *McDuffy v. Sec'y of the Exec. Office of Educ.*, 615 N.E.2d 516 (Mass. 1993).

- NAEP data for eighth-grade reading scores does not go back to 1992. *See* Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., *The Nation's Report Card: History of State Participation, 1990–1998*, http://nces.ed.gov/nationsreportcard/about/statehistorypublic.asp (last visited Mar. 24, 2009).

- Some states did not participate in the NAEP testing until they were required to do so by NCLB in 2003. *See id.*

- NAEP changed its rules regarding inclusion and accommodations in 1996, and readers are cautioned about making long-term trend comparisons before and after that date. *See* Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., *NAEP Inclusion Policy: Inclusion of Special-Needs Students*, http://nces.ed.gov/nationsreportcard/about/inclusion.asp (last visited Mar. 24, 2009).

- Not all students in New Jersey received funding under the New Jersey court decree. *See Abbott v. Burke*, 575 A.2d 359, 384–86 (N.J. 1990).

Even putting those limitations aside, Hanushek's conclusion is suspect. According to NAEP results for the four states in question during the years for which complete data is available, students in the four studied states exceeded the average national performance, and the average national rates of progress, in three-quarters of the categories measured. *See* Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., NCES 2007-496, *The Nation's Report Card: Reading 2007* 17 tbl. 6, 35 tbl. 11 (2007), *available at* http://nces.ed.gov/nationsreportcard/pdf/main2007/20

07496.pdf; Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., NCES 2007-494, *The Nation's Report Card: Mathematics 2007* 16 tbl. 6, 33 tbl. 11 (2007), *available at* http://nces.ed.gov/nationsreportcard/pdf/main2007/2007494.pdf.

C. Petitioners' Scholars Incorrectly Claim Support From The Work of Baker And Markham, Both Of Whom Have Joined This Brief.

One of the few non-Hanushek sources cited by Petitioners' scholars is Bruce D. Baker & Paul L. Markham, *State School Funding Policies and Limited English Proficient Students*, 26 Bilingual Res. J. 659 (2002). In citing this work for the proposition that schools will not spend money efficiently or effectively, Petitioners' scholars take the authors' analysis out of context. These authors, Bruce D. Baker and Paul L. Markham, have joined this brief in support of Respondents.

Baker and Markham criticize as irrational not the use of education funding, but the method by which it is allocated: many states, including states with sizable non-English-speaking populations, were providing insufficient funding for districts to meet the programming costs and needs of ELL students. Petitioners' scholars quote (p.9) the article's statements that "state efforts to help local districts provide adequate programming opportunities for [ELL] are often poorly conceived or applied" and that "funding policies that are neither rational nor equitable" will not improve student performance. *Id.* at 678. According to Baker and Markham, certain funding

policies were irrational because they "fail[ed] to systematically allocate more aid for [ELL] children to districts where more [ELL] children reside" and others allocated more aid "to higher income districts with higher core expenditures per pupil that were less dependent on state aid in general." *Id.* at 674–75.

Thus, far from concluding that additional funding is unnecessary, Baker and Markham stress the opposite: If state aid to ELL students is provided "at levels insufficient to provide for services in full, those districts with the largest numbers of [ELL] pupils will have the greatest difficulty in finding *the resources to provide adequate opportunities.*" *Id.* at 662–63 (emphasis added).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JONATHAN L. MARCUS
Counsel of Record
GREGORY M. LIPPER
COVINGTON & BURLING LLP
1201 Pennsylvania Ave, NW
Washington, D.C. 20004
(202) 662-6000

March 25, 2009

Counsel for Amici Curiae

AMICUS CURIAE BRIEF

13

No. 08-289

FILED
FEB 2 6 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

THOMAS C. HORNE,
Superintendent, Arizona Public Instruction,

Petitioner,

v.

MIRIAM FLORES, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

J. SCOTT DETAMORE
Counsel of Record
JAMES M. MANLEY
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342 2831

BOTH SIDES

24

QUESTION PRESENTED

By interpreting the phrase "appropriate action" under Section 204 of the Equal Education Opportunity Act ("EEOA") as a requirement that the State of Arizona provide for a minimum amount of funding specifically allocated fyor English Language Learner ("ELL") programs statewide, did the Ninth Circuit violate the doctrine prohibiting federal courts from usurping the discretionary power of state governments to determine how to appropriately manage and fund their public education systems?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
IDENTITY AND INTEREST OF AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
I. FEDERALISM IS A CORE COMPONENT OF LIMITED AND ETHICAL GOVERNMENT	4
II. The NINTH CIRCUIT VIOLATED PRINCIPLES OF FEDERALISM BY CONTROLLING A TRADITIONALLY LOCAL DECISION	6
A. THE TEXT OF THE EEOA REQUIRES THAT FEDERAL COURTS HAVE A LIMITED ROLE IN MATTERS OF SCHOOL FUNDING AND MANAGEMENT	6
B. THIS COURT'S PRECEDENT REQUIRES THAT FEDERAL COURTS HAVE A LIMITED ROLE IN MATTERS OF SCHOOL FUNDING AND MANAGEMENT	11
CONCLUSION	18

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Board of Education of Oklahoma City Public Schools v. Dowell, 498 U.S. 237 (1991) 12

Brown v. Board of Education, 347 U.S. 483 (1954) 11

Castañeda v. Pickard, 648 F.2d 989 (5th Cir. 1981) 7, 8, 9, 10, 11

Flores v. Arizona, 480 F.Supp.2d 1157 (D. Ariz. 2007) 7, 8, 16

Flores v. Arizona, 516 F.3d 1140 (9th Cir. 2008) 9, 10, 16, 17 18

Guadalupe Organization, Inc. v. Tempe Elem. School Dist. No. 3, 587 F.2d 1022 (9th Cir. 1978) 10

Honig v. Doe, 484 U.S. 305 (1988) 11

Jefferson v. Hackney, 406 U.S. 535 (1972) 12

Keyes v. School Dist. No. 1, Denver, Colo., 576 F.Supp. 1503 (D. Colo. 1983) 7

Martin Luther King Jr. Elementary School Children v. Ann Arbor School Dist. Bd., 473 F.Supp. 1371 (E.D. Mich. 1979) 6

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) 5

Milliken v. Bradley, 418 U.S. 717 (1974) 14

Milliken v. Bradley, 433 U.S. 267 (1977) 14, 15, 16, 17, 18

TABLE OF AUTHORITIES – Continued

Page

Missouri v. Jenkins, 495 U.S. 33 (1990) 11

Missouri v. Jenkins, 515 U.S. 70 (1995) 12, 14, 15, 16, 17

Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992) 13

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) 12

Spallone v. United States, 493 U.S. 265 (1990) 12

Teresa P. by TP. v. Berkeley Unified School Dist., 724 F.Supp. 698 (N.D. Cal. 1989) 7

U.S. v. Lopez, 514 U.S. 549 (1995) 11

Valencia Co. v. Wilson, 12 F.Supp.2d 1007 (N.D. Cal. 1998) 7

U.S. CONSTITUTIONAL PROVISION

U.S. Const. amend. XIV 2, 6, 11, 12

STATUTES

20 U.S.C. § 1703 6

20 U.S.C. § 1703(f) 6, 10

20 U.S.C. § 1712 6

RULES

Supreme Court Rule 37(2)(a) 1

Supreme Court Rule 37(6) 1

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Letters from The Federal Farmer to The Republican No. 3 (Oct. 10 1787), *in* 1 *The Debate on the Constitution* (Bernard Bailyn ed., 1993) 5

The Federalist No. 32 (Alexander Hamilton) (Clinton Rossiter ed., 1961) 4

The Federalist No. 81 (Alexander Hamilton) (Clinton Rossiter ed., 1961) 4, 5

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief in support of Petitioner.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a non-profit, member-supported public interest law firm dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system. MSLF's more than 9,000 members include businesses and individuals who live and work in nearly every State, including the State of Arizona. All these persons are vitally interested in the curriculum and funding of the schools where they reside. Moreover, MSLF and its members strongly believe that such curriculum and funding decisions

[1] In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than MSLF, made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37(2)(a), the parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of the amicus curiae's intention to file this brief.

should be made on a local level. These decisions should certainly not be made by the federal courts, which have no expertise whatsoever in these matters, nor are the courts intimately familiar with local conditions. Allowing the federal courts to meddle in local school affairs could end innovation designed to improve education for the students in those districts.

MSLF also strongly believes in and actively litigates to promote the concept of federalism and local control. MSLF believes that shared sovereignty of the United States government and the governments of the several States is essential to maintaining a limited and ethical government and is protected by strict adherence to federalism principles. Accordingly, MSLF respectfully presents this brief to argue for these principles in support of Petitioner.

SUMMARY OF THE ARGUMENT

In order to maintain the balance of power established in the federal system, the Framers intended that the federal courts' authority would be limited. Congress was mindful of this principle of federalism when it drafted the Equal Education Opportunity Act ("EEOA"), which gives effect to the Equal Protection Clause of the Fourteenth Amendment in state-run schools. In order to protect the federal structure, Congress limited federal courts' remedial discretion under the EEOA. This Court has also been mindful of the principles of federalism and has protected the

authority of states to regulate their schools, while at the same time ensuring compliance with federal law. The Ninth Circuit did violence to the principles of federalism that this Court has fought to protect and that Congress was mindful of when it drafted the EEOA. By affirming the district court's order requiring Arizona to earmark funding for English Language Learner ("ELL") programs, regardless of the effectiveness of increased funding on meeting the requirements of the EEOA, the Ninth Circuit entangled the federal courts in a dispute that they had no expertise in resolving and disrupted the careful balance of power between the states and the federal government.

ARGUMENT

This Court granted certiorari, in part, to review the Ninth Circuit's apparent disregard for foundational principles of federalism in that court's interpretation of the EEOA. This Court has jealously protected these principles and Congress was mindful of them when it limited federal courts' authority in the EEOA. The shared sovereignty of the United States government and the governments of the several States is protected by strict adherence to federalism principles and is essential to maintaining a limited and ethical government. These principles of federalism are defeated when, as in the instant case, a federal court substitutes its own judgment for that of state and local officials about which funding

choices will best implement a State's educational programs. When the Ninth Circuit ratified the district court's takeover of Arizona's school funding decisions, it stepped outside the power apportioned to the federal courts by the Constitution and the EEOA. This Court should therefore restore the principles of federalism that were damaged by the Ninth Circuit's decision affirming the district court and reverse the judgment of the Ninth Circuit.

I. FEDERALISM IS A CORE COMPONENT OF LIMITED AND ETHICAL GOVERNMENT.

The Framers intended that the federal courts' authority would be limited. Alexander Hamilton characterized the power of the federal courts as "carefully restricted to those causes which are manifestly proper for the cognizance of the national judicature." *The Federalist No. 81*, at 490 (Alexander Hamilton) (Clinton Rossiter ed., 1961). This narrow view of federal judicial power is consistent with the Framers' narrow view of the general federal power. Hamilton explained that federal oppression of state governments would be unlikely because the Constitution protected the "necessity of local administrations for local purposes, [which] would be a complete barrier against the oppressive use of such a [federal] power." *The Federalist No. 32*, at 197 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

These arguments for a limited federal judiciary were offered by the Framers in response to concerns that federal judges wielding both law and equity powers would be unrestrained. As one Anti-Federalist put it, "if the law restrain [the judge], he is only to step into his shoes of equity, and give what judgment his reason or opinion may dictate." Letters from The Federal Farmer to The Republican No. 3 (Oct. 10 1787), *in* 1 *The Debate on the Constitution* 245, 273 (Bernard Bailyn ed., 1993). This colloquy between Federalists and Anti-Federalists suggests that the drafters and ratifiers of the Constitution approved the narrow explanation of the federal judicial power offered in *Federalist No. 81*. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 367 (1995) (Thomas, J., concurring).

As demonstrated below, the courts' role is perhaps most limited by federalism principles in the context of local school funding decisions. The Ninth Circuit ignored this Court's long history of deference to states' authority and improperly took control of the State of Arizona's school funding decisions. Oblivious to this Court's precedent or the text of the EEOA, the district court, in the prescient words of the Federal Farmer, "step[ped] into his shoes of equity, and [gave] what judgment his reason or opinion [] dictate[d]." Letters from The Federal Farmer, *supra*. The district court's usurpation of local funding decisions, and the Ninth Circuit's willingness to go along with such usurpation, undermines the important federalism

principles that protect local decision making from federal control.

II. THE NINTH CIRCUIT VIOLATED PRINCIPLES OF FEDERALISM BY CONTROLLING A TRADITIONALLY LOCAL DECISION.

A. THE TEXT OF THE EEOA REQUIRES THAT FEDERAL COURTS HAVE A LIMITED ROLE IN MATTERS OF SCHOOL FUNDING AND MANAGEMENT.

Pursuant to its authority to enforce the Equal Protection Clause of the Fourteenth Amendment, Congress passed the EEOA to ensure that no student was denied "equal educational opportunity." 20 U.S.C. § 1703; *see Martin Luther King Jr. Elementary School Children v. Ann Arbor School Dist. Bd.*, 473 F.Supp. 1371, 1383 (E.D. Mich. 1979). Section 204 of the EEOA requires each state to "take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. § 1703(f). The remedial section of the EEOA codifies an underlying respect for principles of federalism, providing that, "[i]n formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, *a court*, department, or agency of the United States *shall seek or impose only such remedies as are essential to correct particular denials of equal educational opportunity* or equal protection of the laws." 20 U.S.C. § 1712 (emphasis added).

The relevant statutory standard "appropriate action" is not defined and no legislative history gives these words context or definition. *See Castañeda v. Pickard,* 648 F.2d 989, 1008-09 (5th Cir. 1981). Therefore, the district court relied on the judicially crafted three-part *Castañeda* test. *Flores v. Arizona*, 480 F.Supp.2d 1157, 1164 (D. Ariz. 2007). The *Castañeda* test requires an educational agency to (1) adopt a recognized educational theory; (2) provide programs reasonably calculated to implement the theory; and (3) show, after a reasonable period of time, that language barriers are being overcome. 648 F.2d at 1009-10. Various courts have employed the *Castañeda* test since 1981. *See Valencia Co. v. Wilson*, 12 F.Supp.2d 1007, 1017-18 (N.D. Cal. 1998), *aff'd*, 307 F.3d 1036 (9th Cir. 2002); *Teresa P. by TP. v. Berkeley Unified School Dist.*, 724 F.Supp. 698, 713 (N.D. Cal. 1989); *Keyes v. School Dist. No. 1, Denver, Colo.*, 576 F.Supp. 1503, 1510 (D. Colo. 1983).

In crafting the three-part test as a framework to evaluate "appropriate action," the *Castañeda* court stated that its intention was to "fulfill the responsibility Congress has assigned to [the courts] without unduly substituting our educational values and theories for the educational and political decisions reserved to state or local school authorities or the expert knowledge of educators." 648 F.2d at 1009. Moreover, the court underscored that Congress's use of the vague standard "appropriate action" meant that state and local authorities were to have a "substantial amount of latitude in choosing the programs

and techniques they would use to meet their obligations" under Section 204 of the EEOA. *Id.* at 1009. Additionally, the *Castañeda* court observed that the lack of Congressional guidance forced the court to prescribe standards, although it was "ill equipped to do so" because that task was better "reserved to other levels and branches of government." *Id.* The *Castañeda* court's reluctance to step into the shoes of school administrators was well advised given the limitations placed on federal courts by the remedial section of the EEOA .

Notably, neither the *Castañeda* test nor the EEOA allows federal courts to judge the adequacy of state action to overcome language barriers on the basis of funding, as the district court did here. *See Flores*, 480 F.Supp.2d at 1167. Rather, the *Castañeda* test acknowledges that the EEOA requires only "a genuine and good faith effort, consistent with local circumstances and resources, to remedy language deficiencies." 648 F.2d at 1009.

Here, the Ninth Circuit scarcely inquired as to the genuineness of Arizona's efforts to meet the needs of ELL programs in the Nogales Unified School District ("NUSD"), nor did it consider the limitations of local circumstances and resources with which state and local officials must contend in ensuring compliance with the EEOA. *Flores*, 480 F.Supp.2d at 1167. In a world of unlimited resources the Ninth Circuit's demand for more money for ELL would be of no mind; but in the real world in which state and local school officials must work, resources are limited

and educators must be adept at making the most of whatever resources they can muster. Indeed, when NUSD administrators worked wisely with the resources available to them, the school district made great strides in reducing class size, improving educational materials, hiring high-quality teachers, and firing unsuccessful teachers. *Flores v. Arizona*, 516 F.3d 1140, 1156-57 (9th Cir. 2008) ("Using careful financial management and applying for 'all funds available,' [former NUSD Superintendent Kelt] Cooper was able to achieve his reforms with limited resources."). The facts of this case show that money does not equal progress in public education. Yet, the Ninth Circuit focused only on the level of funding the State of Arizona earmarked for ELL, not on the progress NUSD had made in improving conditions for ELL. *Flores*, 516 F.3d at 1161. Evidence was presented showing that the Scottsdale Unified School District spends substantially more money than does NUSD for its ELL students and maintains an incredible class size ratio of 10:1, yet Scottsdale's ELL 10th graders score worse on Arizona's academic achievement tests than do NUSD's ELL 10th graders. Pet. for Cert. 15 (citing TE 12; TE 7, p. 3; TE 219; TE 245; Tr. Day 6, p. 12). Losing sight of the purpose of the EEOA, the district court abandoned the performance-based standards of the *Castañeda* test and ignored the narrow focus of the EEOA. The district court thereby exceeded the limited role the EEOA provides for federal courts by entangling the court in local school-funding decisions.

The Ninth Circuit declined to overturn the district court ruling, despite the fact that the Ninth Circuit has acknowledged the weak role federal courts play in the statutory scheme of the EEOA. In *Guadalupe Organizatic:n, Inc. v. Tempe Elem. School Dist. No. 3*, 587 F.2d 1022, 1030 (9th Cir. 1978), the Ninth Circuit noted that there is "very little legislative history" for § 1703(f) of the EEOA and that there had been no decision interpreting the "appropriate action requirement" of § 1703(f). Consequently, the *Guadalupe Organization* court was unwilling to require a school district to provide bilingual education, as the plaintiffs would have preferred. *Id.* Instead, the court recognized that it must "adhere closely to the ordinary meaning" of the statute's language and held the school district to be in compliance with the EEOA because it had taken action to remedy language deficiencies. *Id.* Yet, in the instant case the Ninth Circuit boldly issued a ruling that endorsed federal usurpation of state authority over nuanced school-funding decisions, even though the "ordinary meaning" of the EEOA gives the district court no such authority. *Flores*, 516 F.3d at 1180. In so doing, the Ninth Circuit mandated an infusion of earmarked funding completely unconnected to any violation of the EEOA and provided no evaluation of the need for – or educational benefits that would result from – increasing earmarked funding.

The Ninth Circuit also ignored the fact that the EEOA is not a funding statute, but rather a performance statute. *See Castañeda*, 648 F.2d at 1009-10.

If Arizona, through good-faith efforts at oversight and technical expertise, ensures that NUSD's students have a reasonable opportunity to learn English, no more is required. *Castañeda*, 648 F.2d at 1009. Respect for federalism, as codified in the remedial section of the EEOA, should have caused the Ninth Circuit to at least measure the need for and effectiveness of the district court's preferred remedy before it affirmed usurpation of Arizona's authority to manage its own schools.

B. THIS COURT'S PRECEDENT REQUIRES THAT FEDERAL COURTS HAVE A LIMITED ROLE IN MATTERS OF SCHOOL FUNDING AND MANAGEMENT.

This Court has long recognized that public school administration is "perhaps the most important function of state and local governments." *Honig v. Doe*, 484 U.S. 305, 309 (1988) (quoting *Brown v. Board of Education*, 347 U.S. 483, 493 (1954)). In particular, "no matter has been more consistently placed upon the shoulders of local government than that of financing public schools." *Missouri v. Jenkins*, 495 U.S. 33, 51-52 (1990). Although the Fourteenth Amendment changed the balance of power between the States and the federal government, it remains "well established that education is a traditional concern of the States." *U.S. v. Lopez*, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring). Moreover, federal interference with the educational decisions of the states raises serious federalism concerns. *Id.* In order to maintain the

restraints on equity power that the federal system provides, federal courts must be mindful of their limited role in crafting equitable remedies that invade the states' independence. *See Missouri v. Jenkins*, 515 U.S. 70, 132 (1995) (*Jenkins II*) (Thomas, J., concurring).

This Court has been especially mindful of federalism principles in cases involving school funding. *See, e.g., Jenkins*, 515 U.S. at 99; *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 42 (1973). Although the EEOA creates an affirmative obligation on schools to overcome language barriers, this Court has acknowledged that states can take many routes to provide funding for public schools. In rejecting an Equal Protection claim against Texas's school funding system, this Court noted that, "[t]he very complexity of the problems of financing and managing a . . . public school system suggests that 'there will be more than one constitutionally permissible method of solving them,' and that . . . 'the legislature's efforts to tackle the problems' should be entitled to respect." *Rodriguez*, 411 U.S. at 42 (quoting *Jefferson v. Hackney*, 406 U.S. 535, 546-47 (1972)). This deference to local decision making is consistent with this Court's recognition of the limits of federal power in other contexts.

For example, in *Spallone v. United States*, 493 U.S. 265, 272 (1990), this Court struck down a series of steep fines against members of a City Council because the district court failed to "exercise the least possible power adequate to the end proposed." Similarly, in *Board of Education of Oklahoma City Public*

Schools v. Dowell, 498 U.S. 237 (1991), this Court affirmed the proposition that when a constitutional violation has been rectified, judicial oversight should end. Once again, in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), this Court reversed a district court's refusal to modify a consent decree to allow double bunking in jail cells. In so doing, this Court admonished lower courts to be flexible in tailoring modifications to consent decrees in institutional reform litigation and to be mindful of financial constraints in devising a remedy. *Id.* at 392-93. These cases illustrate the restraint federalism principles must exert on federal courts, lest the federal judiciary lose respect for the allocation of powers within the federal system. Deference to the expertise of local and state governments, which bear the burden of measuring and curing problems of institutional reform, is essential if the principles of federalism are to have any practical effect on the balance of power between the state and federal governments.

Even in the highly charged area of public school desegregation, this Court has admonished lower courts to be mindful of the federal courts' limited role and to exercise discretion when their judgments invade the authority of local leaders. In narrowing an interdistrict remedy to intradistrict segregation, this Court was guided in its decision by acknowledgment of the fact that, "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools

and to quality of the educational process." *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974) (*Milliken I*). In addition, this Court has long recognized that "local autonomy of school districts is a vital national tradition, and that a district court must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution." *Jenkins*, 515 U.S. at 99 (citations omitted).

In *Jenkins* this Court overturned a comprehensive judicial remedy directing the state to spend massive amounts of money. *Id.* at 77-78. In so doing, this Court rejected the district court's imposition of various interdistrict remedies intended to attract "white" students from the suburbs to desegregate an urban school district because such a remedy lacked a sufficient nexus to the intradistrict violation. *Id.* at 94-95. In *Jenkins*, this Court also reaffirmed the three-part framework from *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*), to guide district courts in devising desegregation remedies. That framework established that a judicial remedy must: (1) be determined by the nature and scope of the violation of federal law, *i.e.*, the remedy must be directly related to the violation; (2) be remedial in practice; and (3) take into account the interests of state and local authorities in managing their own affairs. *Jenkins*, 515 U.S. at 88-89. Thus, *Jenkins* confirmed the principle that a remedy must be sufficiently tailored to cure the violation of federal law, without unnecessarily invading a state's authority to regulate its schools. *Id.*

Importantly, Justice Thomas, in his concurring opinion, offered useful wisdom on the proper role of federal courts in matters of school reform. Raising deep concerns about the "extravagant uses of judicial power," he elaborated on the third prong of the *Milliken II* framework:

> Federal judges cannot make the fundamentally political decisions as to which priorities are to receive funds and staff, which educational goals are to be sought, and which values are to be taught. When federal judges undertake such local, day-to-day tasks, they detract from the independent dignity of the federal courts and intrude into areas in which they have little expertise. But I believe that we must impose more precise standards and guidelines on the federal equitable power, not only to restore predictability to the law and reduce judicial discretion, but also to ensure that constitutional remedies are actually targeted toward those who have been injured.

515 U.S. at 133.

The Ninth Circuit would have done well to heed Justice Thomas's wisdom. Instead, it ignored the deeply rooted principles explored above and dictated how the State of Arizona should allocate scarce educational resources. In ruling that the State must create an earmarked funding source for the "incremental costs" of ELL education, the Ninth Circuit not only misconstrued the requirements of the EEOA, it also supplemented its own judgment for that of the

NUSD and state education administrators. The Ninth Circuit gave short shrift to the improvements NUSD has achieved through diligent management practices because these improvements "are due to NUSD's own management improvements, not reliable or sufficient funding." *Flores*, 516 F.3d at 1161 (citing *Flores*, 480 F.Supp.2d at 1160). In other words, the Ninth Circuit would not consider NUSD in compliance with the EEOA until the State had complied with the district court's demand for additional funding, regardless of whether additional funding was necessary to meet the EEOA's requirement of overcoming language barriers.

By downplaying the improvements made through NUSD's enhanced management practices, the Ninth Circuit effectively refused to allow the State to prove that the purpose of the EEOA could be fulfilled without the intrusive involvement of the district court. *Flores*, 516 F.3d at 1161. The Ninth Circuit's inflexible approach fails each prong of the *Milliken* test and transforms the federal courts into adjunct administrators of Arizona's school districts.

First, the district court's remedy was only tangentially related to the alleged violation of the EEOA because the EEOA is a performance statute, not a funding statute. *See Milliken II,* 433 U.S. at 280. The Ninth Circuit all but severed this tangent by overlooking the progress NUSD had made. *See Flores*, 516 F.3d at 1161.

Second, because the alleged violation of the EEOA was not properly confined to the adequacy of NUSD's performance in overcoming language barriers, the remedy mandating ever increasing funding was inherently not remedial in practice. *See Milliken II,* 433 U.S. at 274; *Flores*, 516 F.3d at 1179-80. Moreover, the record reflects this disconnect between violation and remedy. Evidence was presented that educational outcomes have little to no relationship to increased funding. Scottsdale Unified School District spends substantially more money for its ELL students than does NUSD and maintains an incredible class size ratio of 10:1, yet its ELL 10th graders score worse on Arizona's academic achievement tests than do NUSD's ELL 10th graders. Pet. for Cert. 15 (citing TE 12; TE 7, p. 3; TE 219; TE 245; Tr. Day 6, p. 12).

Third, the Ninth Circuit refused to take into account the interests of state and local authorities in managing their own affairs, *see Milliken II,* 433 U.S. at 280-81, despite the fact that it recognized that "the current structure of this litigation is placing the federal judiciary in the uncomfortable position of mediating between state officials with regard to the execution of an obligation of the state as a whole." *Flores*, 516 F.3d at 1165. The Ninth Circuit also acknowledged that the political process was the correct forum to work out the funding disputes that gave rise to the litigation. *Id.*

Nevertheless, the Ninth Circuit ignored its own admonition, and those expressed by Justice Thomas in *Jenkins*, it ignored record evidence regarding the

questionable effectiveness of increased funding, and it ignored the performance-based standards of the EEOA. *Flores*, 516 F.3d at 1179-80. By running roughshod over the *Milliken* test, the Ninth Circuit entangled the federal courts in a dispute that they had no expertise in resolving. In the process the Ninth Circuit did violence to the principles of federalism that this Court has fought to protect and of which Congress was mindful when it limited the federal courts' authority to craft remedies under the EEOA.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

J. SCOTT DETAMORE
Counsel of Record
JAMES M. MANLEY
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorneys for Amicus Curiae

Submitted February 26, 2009

AMICUS CURIAE BRIEF

Nos. 08-289 and 08-294

IN THE
Supreme Court of the United States

THOMAS C. HORNE, ARIZONA STATE SUPERINTENDENT OF PUBLIC INSTRUCTION,
Petitioner,

and

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES AND PRESIDENT OF THE ARIZONA SENATE,
Petitioners,

v.

MIRIAM FLORES ET AL.; STATE OF ARIZONA ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., NATIONAL SENIOR CITIZENS LAW CENTER, NATIONAL HEALTH LAW PROGRAM, AND NEW YORK LAWYERS FOR THE PUBLIC INTEREST AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

JOSHUA CIVIN
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
1444 I Street, NW
10th Floor
Washington, DC 20005

JOHN PAYTON,
Director-Counsel
JACQUELINE A. BERRIEN
DEBO P. ADEGBILE
*ANURIMA BHARGAVA
HOLLY A. THOMAS
LETICIA V. SMITH-EVANS
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
99 Hudson Street, 16th Fl.
New York, NY 10013
(212) 965-2200

**Counsel of Record*

(ADDITIONAL COUNSEL LISTED ON INSIDE COVER)

JANE PERKINS
NATIONAL HEALTH LAW PROGRAM
211 N. Columbia Street
Chapel Hill, NC 27514

HARPER JEAN TOBIN
NATIONAL SENIOR CITIZENS LAW CENTER
1444 Eye Street NW, Suite 1100
Washington, DC 20005

MARIANNE ENGELMAN LADO
NEW YORK LAWYERS FOR
THE PUBLIC INTEREST
151 West 30th Street
New York, NY 10001

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in concluding that no significant change in fact or law justified dissolving its orders requiring the State of Arizona to determine the costs of an appropriate program for English Language Learner (ELL) students and to provide funding that was not arbitrary in relation to those costs.

2. Whether the court of appeals applied the correct standard in reviewing the district court's denial of petitioners' Rule 60(b)(5) motion.

3. Whether a state testing and accountability plan that is approved by the Secretary of Education as a condition for funding under the No Child Left Behind statute automatically satisfies the requirement under the Equal Educational Opportunities Act of 1974 (EEOA), 20 U.S.C. § 1703(f), to "take appropriate action" to overcome language barriers that impede participation in instructional programs.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF AMICI CURIAE 1

INTRODUCTION 3

SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. Because HB 2064 Violates Federal Law, It Forecloses Petitioners' Claim for Rule 60(b)(5) Relief 7

A. The System of State Support for ELL Programs Established by HB 2064 Violates Federal Education Law 7

1. Background on HB 2064 8

2. HB 2064 Violates 20 U.S.C. § 7902 9

3. HB 2064 Also Violates the "Supplement, Not Supplant" Provisions of Federal Law 13

B. HB 2064's Time Limit on ELL Instruction Violates Federal Law 15

C. Petitioners May Not Disavow the Relevance of HB 2064 to Their Rule 60(b)(5) Motion 17

TABLE OF CONTENTS
(continued)

Page

II. Rule 60(b)(5) Relief Is Unwarranted Because Arizona Has Yet to Achieve, Much Less Sustain, Compliance with the District Court's Prior Orders 19

A. As of the Date of Enactment of HB 2064, Arizona Could Not Demonstrate That It Had Established an Effective System to Provide Equal Educational Opportunity for English Language Learners 19

B. Relief Under Rule 60(b)(5) Was Also Inappropriate Because Arizona Could Not Show a Likelihood That It Would Sustain Compliance 24

III. Petitioners Otherwise Fail to Identify a Significant Change in Law or Fact Warranting Rule 60(b)(5) Relief 27

IV. The District Court's Denial of Rule 60(b)(5) Relief Was Consistent with Principles of Federalism 29

CONCLUSION 32

TABLE OF AUTHORITIES

Page(s)

CASES

Agostini v. Felton,
521 U.S. 203 (1997) 27

Alexander v. Califano,
432 F. Supp. 1182 (N.D. Cal. 1977) 14

Board of Education of City School District of City of New York v. Tom F.,
128 S.Ct. 1 (2007) 3

Board of Education of Oklahoma City v. Dowell, 498 U.S. 237 (1991) 1, 20, 25, 31

Bennett v. Kentucky Department of Education,
470 U.S. 656 (1985) 8, 15

Bennett v. New Jersey,
470 U.S. 632 (1985) 8, 14

Brown v. Board of Education,
347 U.S. 483 (1954) 1

Brown v. Board of Education,
349 U.S. 294 (1955) 21

Castañeda v. Pickard,
648 F.2d 989 (5th Cir. 1981) 16

Christensen v. Harris County,
529 U.S. 576 (2000) 12

Columbus Board of Education v. Penick,
443 U.S. 449 (1979) 24

Federated Department Stores, Inc. v. Moitie,
452 U.S. 394 (1981) 20

TABLE OF AUTHORITIES
(Continued)

Page(s)

Firefighters Local Union No. 1784 v. Stotts,
467 U.S. 561 (1984) 7

Flores v. Arizona,
48 F. Supp. 2d 937 (D. Ariz. 1999) 9, 30-31

Freeman v. Pitts,
503 U.S. 467 (1992) 1, 20, 24, 25

Frew v. Hawkins,
540 U.S. 431 (2004) 7, 29, 31

Hull v. Albrecht,
950 P.2d 1141 (Ariz. 1997) 8

Hull v. Albrecht,
960 P.2d 634 (Ariz. 1998) 8

Missouri v. Jenkins,
515 U.S. 70 (1995) 1, 20-21

Morgan v. Nucci,
831 F.2d 313 (1st Cir. 1987) 24

Nevada v. United States,
463 U.S. 110 (1983) 20

New Hampshire v. Maine,
532 U.S. 742 (2001) 17, 18

New York v. U.S. Department of Education,
903 F.2d 930 (2d Cir. 1990) 14

Peacock v. Thomas,
516 U.S. 349 (1996) 31

TABLE OF AUTHORITIES
(Continued)

Page(s)

Riggs v. Johnson County,
73 U.S. 166 (1867) 31

Roosevelt Elementary School District No. 66 v. Bishop, 877 P.2d 806 (Ariz. 1994) 8

Rufo v. Inmates of Suffolk County Jail,
502 U.S. 367 (1992) ..... *passim*

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) 12

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 21

United States v. Oregon State Medical Society,
343 U.S. 326 (1952) 24

United States v. W.T. Grant Co.,
345 U.S. 629 (1953) 26

CONSTITUTIONAL PROVISIONS

Ariz. Const. art. XI, § 1(A) 8

STATUTES AND LEGISLATIVE MATERIALS

20 U.S.C. §§ 1234a-1234d 15

20 U.S.C. §§ 6301, *et seq.* 4

20 U.S.C. § 6311(g)(2) 15

20 U.S.C. § 6321(b)(1) 13

TABLE OF AUTHORITIES
(Continued)

Page(s)

20 U.S.C. § 6623(b) 13

20 U.S.C. § 6825(g) 13, 15

20 U.S.C. §§ 1701, *et seq.* 3

20 U.S.C. § 1703(f) 5, 16

20 U.S.C. § 7902 ..... *passim*

20 U.S.C. § 7709 10

No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1980 (2002) 10

A.R.S. § 15-751, *et seq* 22

A.R.S. § 15-756.01 9

A.R.S. § 15-756.01(I) 9, 10

A.R.S. § 15-756.04 9

A.R.S. § 15-756.11 9

A.R.S. § 15-756.11(E) 13

A.R.S. § 15-756.11(G) 9, 16

A.R.S. § 15-943(2)(b) 9

HB 2064, 47th Leg., 2d Reg. Sess. (Ariz. 2006) ..... *passim*

H.R. Rep. No. 95-1137, *as reprinted in* 1978 U.S.C.C.A.N. 4974 8

RULES

Fed. R. Civ. P. 60(b)(5) ..... *passim*

TABLE OF AUTHORITIES
(Continued)

Page(s)

OTHER AUTHORITIES

Letter from Kerri L. Briggs, Assistant Secretary of Elementary and Secondary Education, U.S. Department of Education, to Tom Horne, Superintendent of Public Instruction, Arizona Department of Education (June 6, 2008) ..... *passim*

Letter from Kerri L. Briggs, Assistant Secretary of Elementary and Secondary Education, U.S. Department of Education, *et al.*, to Chief State School Officers (October 2, 2008), *available at* http://www.ed.gov/programs/sfgp/supplefinalletter2.pdf 11

U.S. Department of Education, *Supplement Not Supplant Provision of Title III of the ESEA* (October 2, 2008), *available at* http://www.ed.gov/programs/sfgp/supplefinalattach2.pdf ..... *passim*

U.S. Department of Justice, Educational Opportunities Section, Cases on English Language Learners, *available at* http://www.usdoj.gov/crt/edo/caselist.php 29

INTEREST OF AMICI CURIAE[1]

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is a non-profit legal organization that assists African Americans and other people of color to secure their civil and constitutional rights. For more than six decades, LDF has worked to dismantle barriers in public education and ensure equal educational opportunity for all students. LDF has litigated numerous landmark education cases, including *Brown v. Board of Education*, 347 U.S. 483 (1954).

A significant portion of LDF's docket has consistently been comprised of cases involving injunctive relief to remedy civil rights violations, and the standards for modification and termination of court decrees are, therefore, of particular and continuing concern. Specifically, LDF has represented parties in several key cases before this Court involving relief pursuant to Federal Rule of Civil Procedure 60(b), including *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Freeman v. Pitts*, 503 U.S. 467 (1992); and *Board of Education of Oklahoma City v. Dowell*, 498 U.S. 237 (1991).

The National Senior Citizens Law Center (NSCLC) is a non-profit organization that advocates

---

[1] Pursuant to Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part, and that no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Respondents Flores *et al.*, have filed a blanket consent letter with the Clerk of the Court; letters of consent from all other parties are lodged with the Clerk of the Court pursuant to Rule 37.3.

nationwide to promote the independence and well-being of low-income older persons and people with disabilities. For more than 35 years, NSCLC has served these populations through litigation, administrative advocacy, legislative advocacy, and assistance to attorneys and paralegals in legal aid programs. NSCLC believes that proper application of the Rule 60(b) standard is essential to maintaining the effectiveness of federal laws that protect its constituents' health, safety, and security.

The National Health Law Program (NHeLP) is one of the country's oldest public interest law firms and works on behalf of low-income people, children, people of color, and limited-English proficient persons to improve access to needed health care services. NHeLP provides legal and policy analysis, advocacy, information, and education. When they are unable to resolve disputes on behalf of clients, NHeLP attorneys engage in litigation to protect clients' rights, safety, and ability to be healthy. NHeLP attorneys' work depends on the ability to enforce settlements and court orders when they are violated.

New York Lawyers for the Public Interest (NYLPI) is a not-for-profit civil rights organization and a federally-funded Protection and Advocacy agency. NYLPI engages in advocacy and litigation on behalf of low income and disadvantaged individuals in New York City. A significant portion of NYLPI's work is on behalf of individuals with disabilities. In this context, NYLPI works to ensure that children with special educational needs are afforded a free and appropriate public education. NYLPI regularly engages in litigation seeking

injunctive relief for civil rights violations and currently monitors consent decrees in cases involving the provision of mental health services for inmates with mental illness, the deinstitutionalization of individuals with mental retardation, and access to public and private spaces for individuals with physical disabilities. NYLPI participated as an *amici* in *Board of Education of City School District of City of New York v. Tom F.*, 128 S.Ct. 1 (2007).

INTRODUCTION

Nine years ago, a federal district court found that Arizona had denied thousands of English Language Learner (ELL) students in the Nogales Unified School District (Nogales) and throughout the state the basic educational opportunities they need to succeed in life. Accordingly, the district court held that Arizona's ELL programs were in violation of the Equal Educational Opportunities Act of 1974 (EEOA), 20 U.S.C. §§ 1701, *et seq.*

The district court's final judgment against the state was not appealed. Now, petitioners seek relief from that final judgment under Federal Rule of Civil Procedure 60(b)(5), claiming compliance with the judgment. Over the entire course of these nine years, however, the state has persistently failed to comply with the obligations of the final judgment. That noncompliance is a sufficient ground to deny petitioners Rule 60(b)(5) relief.

There is also a simpler and equally compelling reason for this Court to affirm: As the courts below determined and as recent guidance from the U.S.

Department of Education confirms, HB 2064—the state legislature's measure adopted in 2006 and asserted as the basis for state compliance with the district court's judgment—flatly contravenes federal law. *See* HB 2064, 47th Leg., 2d Reg. Sess. (Ariz. 2006). It was on this basis that the State of Arizona and the Arizona Board of Education, originally defendants in this case, refused to join the three state officials who are petitioners here in their request for Rule 60(b)(5) relief.

Because HB 2064 plainly violates federal law, this Court can affirm the decision below without entering the educational policy debates that petitioners and their *amici* discuss at length; without addressing the relationship between the EEOA and the No Child Left Behind Act (NCLB), 20 U.S.C. §§ 6301, *et seq.*; and without accepting petitioners' request for *de novo* review of the district court's detailed factual findings of persistent noncompliance with its 2000 judgment and subsequent remedial orders.

SUMMARY OF ARGUMENT

Petitioners invoke Rule 60(b)(5) which provides that "[o]n motion and just terms, the court may relieve a party . . . from a final judgment" for specified reasons. Of particular relevance to this case, relief may be granted if "the judgment has been satisfied" or if "applying [that judgment] prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5).

In the district court, the primary basis for petitioners' Rule 60(b)(5) motion was that HB 2064

satisfied the original 2000 judgment by fulfilling Arizona's obligation under the EEOA "to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. § 1703(f); *see* J.A. 65. But the law is clear that a moving party is not entitled to Rule 60(b)(5) relief where, as here, the basis it advances for that relief violates federal law:

- First, HB 2064 contravenes federal statutory provisions designed to ensure that states and local school districts use federal NCLB funds to provide educational programs for ELL and other subgroups of students above and beyond what they otherwise would provide.
- Second, HB 2064 violates the EEOA by arbitrarily cutting off state funds for ELL classroom instruction after a student has received services for two years, irrespective of whether that student is sufficiently fluent in English to participate in a mainstream program or whether the school district has adequate funds of its own to continue such instruction.

See infra Part I.

In apparent recognition of these violations, petitioners shifted positions and now assert that the state had satisfied the district court's judgment prior to (and notwithstanding) the enactment of HB 2064, and is thus entitled to Rule 60(b)(5) relief. Again, the controlling law is clear. For a moving party to obtain relief based on its satisfaction of a prior judgment, a manifest prerequisite is good-faith, substantial, and sustainable compliance. Otherwise, principles of finality would be severely undermined.

Here, Arizona failed to demonstrate that it has ever—before or after passage of HB 2064—fully remedied the EEOA violations identified by the court's prior orders, much less that the state has the commitment and capacity to sustain any improvements in ELL programs that have been made since the 2000 judgment. *See infra* Part II.

Petitioners likewise do not warrant relief under the equitable prong of Rule 60(b)(5) because they have not demonstrated a significant change in law or fact. *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992). First, any changed factual circumstances have *reduced* the burden of satisfying the district court's prior orders and thus do not meet the *Rufo* standard. Second, this Court need not reach petitioners' contention that the 2002 enactment of NCLB qualifies as a significant change in law for purposes of Rule 60(b)(5). Given that HB 2064 violates key NCLB provisions, this is not an appropriate case to decide whether a state's compliance with NCLB satisfies its obligations under the EEOA. *See infra* Part III.

Finally, the district court's actions since 2000 have been consistent with principles of federalism. The district court reviewed the state's funding scheme under a deferential arbitrary-and-capricious standard, repeatedly extended deadlines, respected the state's policy judgments, and worked within the framework chosen by the state for administering and funding ELL programs. In light of the deference accorded by the district court, the state's continuing failures to comply, and its recent enactment of a legally flawed framework for ELL programs through HB 2064, there are no grounds for the Rule 60(b)(5)

relief that petitioners seek. Federal courts must be sensitive to federalism tenets, but are not limited to identifying legal violations and "hoping for compliance." *Frew v. Hawkins*, 540 U.S. 431, 440 (2004). *See infra* Part IV.

ARGUMENT

I. Because HB 2064 Violates Federal Law, It Forecloses Petitioners' Claim for Rule 60(b)(5) Relief.

In the district court, petitioners proffered the state legislature's 2006 enactment of HB 2064 as the primary ground for their Rule 60(b)(5) motion. J.A. 65. But HB 2064 cannot provide a basis for Rule 60(b)(5) relief because it violates federal law in several ways. As this Court held in *Rufo*, a Rule 60(b)(5) modification "must not create or perpetuate" a violation of federal law. 502 U.S. at 391; *see also Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 576-79 & n.9 (1984) (noting that a district court cannot enter a disputed modification of a consent decree if the resulting order is inconsistent with federal law).

A. The System of State Support for ELL Programs Established by HB 2064 Violates Federal Education Law.

The laws governing the disbursement of federal NCLB funds require states and school districts to use those funds to enhance existing resources for targeted student populations, including ELL students. Such provisions ensure that limited federal funds are used as Congress intended: to

enhance educational opportunities by providing "'specific types of children in specific areas with special services above and beyond those normally provided as part of the district's regular educational program.'" *Bennett v. New Jersey*, 470 U.S. 632, 635 (1985) (quoting H.R. Rep. No. 95-1137, at 4, *as reprinted in* 1978 U.S.C.C.A.N. 4974); *accord Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 659 (1985). In direct contravention of these laws, HB 2064 demands that state funding for ELL students be reduced by the amount of federal funds that a particular school district receives.

1. Background on HB 2064.

HB 2064 modifies, but does not fundamentally change, the approach to state educational funding in place prior to and since 2000, when the district court concluded that the state was in violation of the EEOA. Arizona continues to allocate state funds to school districts using a weighted funding system to ensure that all students receive a basic education as required by the state constitution. Ariz. Const. art. XI, § 1(A); Pet.App. 122a-123a.[2]

This weighting system recognizes that some classes of students, such as ELL students, need extra programs or services to attain the basic educational competencies that the state constitution

---

[2] In a series of 1990s decisions, the Arizona Supreme Court interpreted the state constitution to guarantee state funding to ensure school districts meet basic standards. *See Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994) (en banc), *appeal after remand*, *Hull v. Albrecht*, 950 P.2d 1141 (Ariz. 1997), *appeal after remand*, 960 P.2d 634 (Ariz. 1998).

guarantees, and that there are additional costs specifically associated with those programs. *See* Pet.App. 13a; *see also Flores v. Arizona*, 48 F. Supp. 2d 937, 947, 956 (D. Ariz. 1999). To cover these additional costs, the state adds "Group B weights" to the base level of funding provided to local school districts. *See* A.R.S. § 15-943(2)(b). The system is structured so that the state serves as a necessary backstop when school district resources are insufficient to support the constitutionally required minimum program. *See* Pet.App. 126a.

HB 2064 slightly raised the Group B weight per ELL student, but made the increase contingent on the district court's determination that HB 2064 satisfied the 2000 judgment. A.R.S. § 15-756.01. HB 2064 also established two new separate funding sources for ELL programs: a structured English immersion (SEI) fund, A.R.S. § 15-756.04, and a compensatory instruction fund, A.R.S. § 15-756.11. Pursuant to HB 2064, a school district may apply to the state SEI fund for additional resources to cover the difference between the support generated by the Group B weights and the district's actual cost of funding ELL programs. A.R.S. § 15-756.01(I). The compensatory instruction fund offers school districts monies to provide tutoring, summer school, and other programs to improve English proficiency *outside* the "normal classroom" environment. A.R.S. § 15-756.11(G).

2. HB 2064 Violates 20 U.S.C. § 7902.

As the district court and court of appeals held, there is a direct and unavoidable conflict between HB 2064's ELL funding requirements and 20 U.S.C.

§ 7902. *See* Pet.App. 86a, 113a. 20 U.S.C. § 7902 is the product of revisions to the Elementary and Secondary Education Act of 1965 (ESEA), effectuated by the enactment of NCLB in 2002. *See* Pub. L. No. 107-110, § 9522, 115 Stat. 1980 (2002). It prohibits a state from taking into account federal education funding received by a school district pursuant to NCLB when "determining the eligibility of [the school district] for State aid, or the amount of State aid, with respect to free public education of children."[3] In other words, states must not penalize school districts that receive federal education dollars by adjusting those districts' share of otherwise available state education funding.

HB 2064 violates 20 U.S.C. § 7902 because it requires a school district to reduce its request for SEI funding by the amount of NCLB funds the school district receives, including: (i) "[a]ll federal [T]itle III monies and any other federal monies designated solely for the educational needs of English language learners," and (ii) a proportional amount of Title I and Title IIA funds determined by the number of students in the district's ELL programs. A.R.S. § 15-756.01(I). As the state respondents acknowledge, *see* State Respondents' Br. 11, HB 2064 thus "manifestly requires that federal funds be considered" in the distribution of state SEI funds to school districts. Pet.App. 86a (internal citations omitted); *see also* Pet.App. 113a.

---

[3] Although it is not determinative here, 20 U.S.C. § 7902 includes an exemption for federal impact aid received by school districts pursuant to 20 U.S.C. § 7709.

In June 2008, four months after the court of appeals' decision, the U.S. Department of Education wrote to petitioner Tom Horne, the Arizona Superintendent of Public Instruction, to express the Department's concerns about the contradiction between HB 2064 and federal law. *See* Letter from Kerri L. Briggs, Assistant Sec'y of Elementary and Secondary Educ., U.S. Dep't of Educ., to Tom Horne, Superintendent of Pub. Instruction, Ariz. Dep't of Educ. (June 6, 2008) (hereinafter the "Horne letter"); State Respondents' Br. 19 & App. 1-4.[4] In the Horne letter, the Department warned Arizona that 20 U.S.C. § 7902 clearly prohibits any reduction in the amount of state SEI funds that a school district is eligible to receive, if the reduction is based on that district's receipt of federal NCLB funds. *Id.* App. 2.

Four months later, the U.S. Department of Education expanded on the Horne letter and issued guidance "to provide States with information on several funding issues . . . under Title III of the ESEA," which governs NCLB programmatic funding targeted at ELL students. *See* U.S. Dep't of Educ., *Supplement Not Supplant Provision of Title III of the ESEA* (Oct. 2, 2008) (hereinafter "Title III Guidance").[5] The Title III Guidance addressed the operation of 20 U.S.C. § 7902 in circumstances

---

[4] A copy of the Horne letter is included in the appendix to the state respondents' brief.

[5] The Title III guidance and the Department's transmittal letter are available at: http://www.ed.gov/programs/sfgp/supplefinalattach2.pdf and http://www.ed.gov/programs/sfgp/supplefinalletter2.pdf.

identical to those created by the provisions of HB 2064 at issue here:

> The Department has encountered situations in which a State proposed to implement a law to reduce the amount of State aid available to local educational agencies (LEAs) for implementing language instruction educational programs for [ELL] students based on the amount of Title III funds its LEAs receive. Such statutes and policies violate Federal law. Section 9522 of the ESEA [20 U.S.C. § 7902] specifically prohibits a State from taking into consideration payments under any ESEA program (with the exception of Impact Aid) in determining the amount of State aid an LEA receives for the free public education of its children.

Title III Guidance 2-3.

The Horne letter and the Department's Title III Guidance have persuasive power and are thus "'entitled to respect.'" *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Accordingly, they confirm the conclusions of the courts below that the SEI funding requirements set forth by HB 2064 violate 20 U.S.C. § 7902.[6]

---

[6] The district court and the U.S. Department of Education addressed HB 2064's violation of 20 U.S.C. § 7902 only with respect to SEI funding. As the court of appeals correctly observed, a violation of § 7902 is equally apparent with respect to HB 2064's compensatory instruction requirements, which effectively penalize school districts by providing them with less

3. HB 2064 Also Violates the "Supplement, Not Supplant" Provisions of Federal Law.

As the district court determined, HB 2064 also violates "supplement, not supplant" requirements contained in certain NCLB provisions, including Title I (which funds programs for disadvantaged students generally), Title IIA (which funds highly qualified teachers), and Title III (which funds ELL programs). *See, e.g.*, 20 U.S.C. § 6321(b) (Title I); 20 U.S.C. § 6623(b) (Title IIA); and 20 U.S.C. § 6825(g) (Title III). These requirements specifically forbid states and school districts from using these federal funds to replace state and local funding resources. *See* Pet.App. 114a; Title III Guidance 3; State Respondents' Br. App. 3.[7]

In the Horne letter, the U.S. Department of Education stressed that HB 2064's treatment of federal funds received by Arizona school districts pursuant to NCLB Titles I, IIA, and III violated anti-supplanting prohibitions because, "in the absence of these Federal funds, the district would have received and expended more State funds to serve ELL students." State Respondents' Br. App. 3. The Department's subsequent Title III Guidance reminded Arizona and all other states that "any reduction in the amount of State funds [a school

---

compensatory instruction funding to the extent they receive federal dollars. A.R.S. § 15-756.11(E); Pet.App. 86a-87a.

[7] In light of its determination that HB 2064 clearly violated 20 U.S.C. § 7902, the court of appeals did not consider whether HB 2064 also violated these "supplement, not supplant" provisions. Pet.App. 88a-89a.

district] receives to implement language instruction educational programs based on the receipt of Federal funds for its [ELL] population under Title III violates the non-supplanting provision" of that Title. Title III Guidance 3.[8]

As this Court has noted, supplement-not-supplant obligations are not mere technicalities. *See Bennett*, 470 U.S. at 635. "Recognizing the fungibility of funds in state and local education budgets," these provisions effectively "limit the possibility that state and local educational agencies would use [federal] funding merely to maintain existing programs for educationally disadvantaged children while shifting [state and local] resources to regular educational programs." *New York v. U.S. Dep't of Educ.*, 903 F.2d 930, 934 (2d Cir. 1990); *see also Alexander v. Califano*, 432 F. Supp. 1182, 1189 (N.D. Cal. 1977) (Schwarzer, J.) ("[C]hildren eligible for Title I aid are not for that reason to receive less than they would otherwise be entitled to receive under *any* State or local program.") (emphasis in original).

HB 2064's clear violation of federal anti-supplanting requirements has serious consequences. As the district court found, "a district or school whose incremental costs [for ELL students] exceed the Group B weight provided to all schools will face

---

[8] The Department's position should have come as no surprise to petitioners. Thomas Fagan—a 29-year Department veteran and Title I funding expert who testified for respondents during the district court's 2007 evidentiary hearing—stated that he had "'never seen such a blatant violation' of supplement not supplant restrictions." Pet.App. 106a.

the choice of violating federal laws governing the use of their federal funds, thereby jeopardizing both those funds and eligibility for future federal funds, or underfunding [their] ELL instructional programs," thus violating its EEOA obligations. Pet.App. 114a. By effectively compelling systemic underfunding of ELL instruction, HB 2064 also violates the EEOA. *Id.*; *see also* Title III Guidance 2 (concluding that use of NCLB Title III ELL funds "to provide core language instruction educational programs . . . would violate the supplement not supplant provision in section 3115(g) [20 U.S.C. § 6825(g)] of the Act as such services are required [under the EEOA and other laws] to be provided by States and districts regardless of the availability of Federal Title III funds").

Potential penalties for supplanting state dollars with federal dollars are significant; they include withholding or repayment of all federal educational funds Arizona receives. 20 U.S.C. §§ 1234a-1234d, 6311(g)(2); *see also Bennett*, 470 U.S. at 662-66. For this reason, the state respondents did not join petitioners' motion for Rule 60(b)(5) relief. *See* State Respondents' Br. 16.

B. HB 2064's Time Limit on ELL Instruction Violates Federal Law.

HB 2064's arbitrary two-year restriction on SEI and Group B weighted funding of ELL education also violates the EEOA. Pet.App. 114a-115a. After two years, school districts must choose between placing an ELL student in mainstream classes, even if they have not been reclassified as proficient in English, or diverting funds from other parts of their

educational programs for ELL instruction. While compensatory instruction funds remain available to school districts after two years, they may be used only for programs outside the "normal classroom" environment. A.R.S. § 15-756.11(G).

The EEOA places no such time limit on a state's obligation to ELL students. *See* 20 U.S.C. § 1703(f). Rather, the EEOA seeks to ensure "that schools [have] made a genuine and *good faith effort* . . . to remedy the language deficiencies of their students." *Castañeda v. Pickard*, 648 F.2d 989, 1009 (5th Cir. 1981) (emphasis added). At the district court's 2007 evidentiary hearing, "[w]hile all witnesses agreed that some students may swiftly become proficient in English, they also agreed that many will need ELL instruction for more than two years, and that some will still need help after three years of training." Pet.App. 34a. The district court made subsequent factual findings that the average time students spend in ELL programs well exceeded HB 2064's two-year cut-off, including in Nogales, where, "[o]n average, it takes ELL students . . . four to five years to be reclassified as English proficient." Pet.App. 108a.

By abandoning non-English proficient students to struggle in mainstream classes after only two years of ELL instruction, HB 2064 does not represent a good-faith (or even reasonable) attempt to comply with the EEOA's requirement that students receive "'language assistance [that will] enable them to participate in the instructional program of the district.'" Pet.App. 8a (quoting *Castañeda*, 648 F.2d at 1008).

C. Petitioners May Not Disavow the Relevance of HB 2064 to Their Rule 60(b)(5) Motion.

In apparent recognition of the deficiencies inherent in HB 2064, petitioners have shifted away from their prior reliance on HB 2064 as the primary basis for their Rule 60(b)(5) motion. Before this Court, they assert that they are entitled to Rule 60(b)(5) relief irrespective of HB 2064. *See* Superintendent's Br. 7, 33-51; Legislative Petitioners' Br. 31-32. Significantly, neither of the petitioners' merits briefs even mentions 20 U.S.C. § 7902 or NCLB's non-supplanting provisions.

Petitioners should be estopped from disavowal of their prior reliance upon HB 2064 as the primary basis for Rule 60(b)(5) relief. In *New Hampshire v. Maine*, 532 U.S. 742 (2001), this Court noted that the purpose of judicial estoppel "is to protect the integrity of the judicial process, by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Id.* at 749-50 (internal quotation marks and citations omitted).

For the legislative petitioners, HB 2064 was the primary rationale for their involvement in this case. *See* Pet.App. 175a, 176a. In their motion to intervene filed just days after HB 2064 was enacted, they asserted that their involvement was necessary "to allow a full defense" of HB 2064. J.A. 57; *see also* J.A. 81 (state house of representatives resolution authorizing intervention specifically "to defend the new state plan for English language learners as enacted in H.B. 2064"); J.A. 84 (state senate

resolution providing a similarly focused rationale for intervention).

Petitioners now seek to disavow their early reliance on HB 2064 precisely to refashion their flawed theory to meet the "exigencies of the moment." *New Hampshire*, 532 U.S. at 750. Yet, without consideration of the statute that was the state's direct response to the district court's prior orders, and which governs operation of ELL programs in Arizona to this day, it would be impossible to rule on petitioners' Rule 60(b)(5) motion.

Even if petitioners are not estopped from disavowal of their reliance upon HB 2064 as the primary basis for Rule 60(b)(5) relief, petitioners cannot meet their Rule 60(b)(5) burden to demonstrate that they have otherwise complied with the district court's judgment. Indeed, legislative petitioners admitted below that they would have difficulty asserting grounds for Rule 60(b)(5) relief without HB 2064. *See* J.A. 59-60 ("If the Court finds the Act to be inadequate to satisfy the Court's orders, the Court may compel the Legislature to return to the task and to find money to pay for increased spending . . . .").[9]

---

[9] Petitioners seek to have it both ways. *See, e.g.*, Superintendent's Br. 15 n.9 (noting that HB 2064 "further advanced ELL education"). The testimony at the evidentiary hearing regarding purported improvements in ELL programs in Nogales relied significantly on initiatives implemented as a result of HB 2064. *See, e.g.*, J.A. 181-85, 212.

II. Rule 60(b)(5) Relief Is Unwarranted Because Arizona Has Yet to Achieve, Much Less Sustain, Compliance with the District Court's Prior Orders.

Petitioners also argue that Rule 60(b)(5) relief is warranted because, even before enactment of HB 2064, the state had complied fully with the 2000 declaratory judgment and "cured" the EEOA violations. Superintendent's Br. 32.

Petitioners failed to demonstrate that the state satisfied the judgment for two reasons. First, based upon a thorough review of the record, the district court determined, and the court of appeals agreed, that petitioners had not demonstrated actual compliance with prior orders. Second, to the extent that Arizona has taken some steps towards remedying the EEOA violations identified by the district court, the adoption of HB 2064 and other recent actions raise serious doubts about the state's good-faith commitment and capacity to sustain any such progress.

A. As of the Date of Enactment of HB 2064, Arizona Could Not Demonstrate That It Had Established an Effective System to Provide Equal Educational Opportunity for English Language Learners.

The posture of this case is significant. This is not an appeal from the judgment of the district court. Instead, this is a prayer to be relieved from that unappealed final judgment. Petitioners do not dispute the district court's finding that, as of 2000, the state legislature's failure to raise base funding amounts to cope with inflation and to identify

properly the extra costs of programs for ELL students caused significant educational shortfalls for ELL students in Nogales and statewide, including programmatic deficiencies in teachers, tutors, and class size. *See* Superintendent's Br. 8-13; Legislative Petitioners' Br. 18. Indeed, there was no appeal of the district court's judgment that those educational deficiencies and the failure of the state to present a rational funding structure to support programs for ELL students violated the EEOA. Therefore, all state officials, including the three petitioners here, are bound to satisfy the district court's mandate. *See Nevada v. United States*, 463 U.S. 110, 129-30 (1983); *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981).

Arizona has not met its burden of demonstrating that it is entitled to Rule 60(b)(5) relief because it has never satisfied the terms of the original unappealed judgment. "[I]n deciding whether to modify or dissolve a[n injunctive] decree, a[n enjoined party]'s compliance with previous court orders is obviously relevant." *Bd. of Educ. of Oklahoma City Pub. Sch. v. Dowell*, 498 U.S. 237, 249 (1991). "Among the factors which must inform the sound discretion of the court in ordering partial withdrawal [of judicial supervision] are the following: whether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn . . . ." *Freeman v. Pitts*, 503 U.S. 467, 491 (1992); *accord Missouri v. Jenkins*, 515 U.S. 70, 89

(1995).[10] Petitioners, however, can point to no record of good-faith compliance with the court's orders.[11]

Following the original 2000 judgment, the state failed to create an effective system to ensure that ELL students receive equal educational opportunities in Arizona's public schools and that the state serves as the appropriate backstop when local funding is insufficient to cover the critical needs of ELL students. Most significantly, the state neither articulated a non-arbitrary rationale for its backstop funding of ELL programs nor specified the costs to school districts of providing the various elements of an adequate ELL program.

In framing the original 2000 order, the district court relied on the state's representation that the

---

[10] The cited cases were school desegregation actions, but the principles announced and applied by this Court extend to injunctive relief cases in general. In *Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*), this Court stated that "[i]n fashioning and effectuating the decrees [in those cases], the courts will be guided by equitable principles." *Id.* at 300. That point was reaffirmed in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), where the Court observed that "a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right." *Id.* at 15-16.

[11] This Court's decision in *Rufo* does not set a standard for determining whether Rule 60(b)(5) relief is warranted because a party has satisfied a prior judgment. *Rufo* addressed only the equitable prong of Rule 60(b)(5), as discussed further *infra* in Part III, and petitioners cite *Rufo* in only a cursory fashion in the portions of their briefs contending that the 2000 judgment has been satisfied. *See* Superintendent's Br. 34-35; Legislative Petitioners' Br. 31-44.

legislature had established a committee to conduct a cost study, noting that this study would provide "the first step the state needed to take towards setting a minimum base funding level for [ELL] programs that would not be arbitrary and capricious." J.A. 32-33. The committee did submit a report, but it failed to recommend the level of funding necessary to support effective ELL programs. J.A. 33.

In October 2000, ten months after issuance of the declaratory judgment, the district court observed that Arizona "ha[d] not even taken the first step" toward compliance, and ordered Arizona to "prepare a cost study to establish the proper appropriation to effectively implement" ELL programs "in a timely fashion." J.A. 34, 39, 42. In November 2000, a voter referendum, Proposition 203, required school districts to change to structured English immersion as their model for ELL instruction. J.A. 387; A.R.S. § 15-751, *et seq.* Proposition 203 did not alter the state's obligation under the original 2000 judgment. *See* Pet.App. 150a. Accordingly, "the State agreed that the cost study that was to be prepared pursuant to the Court's October 12, 2000 Order would reflect the funding and resources necessary to train and develop teachers of ELL students under the Proposition." J.A. 387.

The cost study released in 2001 "proved to be a disappointment" because it did not provide the data necessary for the state to begin remedying the EEOA violation. Pet.App. 16a. Moreover, the legislature did not appropriate funds based on this study. Pet.App. 17a; J.A. 42. In June 2001, the district court again ordered Arizona to establish a funding system that "shall bear a rational relationship to the

actual funding needed" for ELL students to master basic state-specified academic skills, and set a deadline of January 31, 2002 for compliance. J.A. 44. In December 2001, the legislature enacted HB 2010, which provided for a more comprehensive cost study and increased ELL funding in the interim. Pet.App. 156a-157a. In a June 2002 order, the district court deemed HB 2010's funding levels adequate "as an interim measure pending" the cost study funded by the statute. J.A. 54. The final draft of the cost study was not submitted until February 2005. Pet.App. 19a. While the cost study included expert estimates of ELL funding levels appropriate to support EEOA-compliant programs, the State once again failed to implement its findings. *Id.*

In a January 2005 order, the district court gave the state until the later of the close of the 2005 legislative session or April 30, 2005 to "appropriately and constitutionally fund[ ] the state's ELL programs taking into account the Court's previous orders." J.A. 393. Arizona did not meet either deadline. In December 2005, the district court held the state in contempt, Pet.App. 155a, but gave it yet another chance. The district court set a new deadline 15 days after the beginning of the 2006 legislative session. Pet.App. 173a. In response, the state legislature enacted HB 2064, which became law on March 9, 2006. Pet.App. 268a.

In sum, while overall state education funding levels may have increased from 2000 through the enactment of HB 2064, the state failed to establish a rational system to determine and then meet the ELL funding needs of school districts.

B. Relief Under Rule 60(b)(5) Was Also Inappropriate Because Arizona Could Not Show a Likelihood That It Would Sustain Compliance.

Even if Arizona's actions between the 2000 judgment and the spring of 2006 positively impacted educational opportunity for ELL students, Rule 60(b)(5) relief was correctly denied because petitioners failed to show that the state would continue to meet the needs of ELL students if the injunction were withdrawn.

Such a threshold demonstration of sustainability is required. *See United States v. Oregon State Med. Soc'y*, 343 U.S. 326, 333 (1952) ("It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when . . . there is probability of resumption."). In assessing sustainability, examination of a moving party's record of good-faith compliance with previous court orders is again instructive, for it "reduces the possibility that [the party]'s compliance with court orders is but a temporary . . . ritual." *Freeman*, 503 U.S. at 498-99 (quoting *Morgan v. Nucci*, 831 F.2d 313, 321 (1st Cir. 1987)). This Court announced in *Freeman* that where such a record of compliance is absent, "we have without hesitation approved comprehensive and continued district court supervision." *Id.* at 499 (citing *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 461 (1979)).

Here, the district court noted that for the seven years "[p]rior to the end of the 2007 Legislative Session no action was taken to comply with the Original [2000] Order." J.A. 87. While the state

finally took some action in 2006 by passing HB 2064, it still failed to meet the district court's repeated and straightforward request for a system of support for ELL programs that was rationally related to the program models the state itself recommended. This failure led the district court to conclude that Arizona was still in "willful violation" of its prior orders without a proper defense for its "inability to comply." J.A. 89.

To demonstrate sustainability, Arizona must also show that it is unlikely that it will again violate federal law. *See Freeman*, 503 U.S. at 498 (noting that a "history of good-faith compliance . . . enables the district court to accept the school board's representation that it has accepted the principle of racial equality and will not suffer intentional discrimination in the future"); *Dowell*, 498 U.S. at 247 (holding that the "purposes of the desegregation litigation had been fully achieved" when the school district was being operated in compliance with the law *and* "it was unlikely that the Board would return to its former ways"). Here, the deficiencies of HB 2064 stand as irrefutable evidence of Arizona's failure to establish a sustainable structure that meets the requirements of the EEOA. Pet.App. 179a. Indeed, HB 2064 makes things worse, by requiring Arizona and local school districts to violate multiple federal laws. *See supra* Part I.

Because of these defects, any progress that Arizona school districts have made is likely to be "fleeting at best." Pet.App. 100a. After the eight-day evidentiary hearing on petitioners' Rule 60(b)(5) motion, the record was clear that Nogales, the district from which this lawsuit originally arose, has

not received adequate funding from the State, forcing it to draw monies away from other programs and students to support instruction for ELL students and to pass repeated local tax overrides to maintain adequate funding levels. Neither of these approaches is sustainable.

Nogales Superintendent Guillermo V. Zamudio testified that, even with the district's commendable streamlining of school programming and creation of greater economies of scale, resource constraints undermine the district's ability to provide an appropriate education to its ELL students. *See* Pet.App. 36a-37a. Even petitioners acknowledge that Nogales and other school districts in Arizona are likely to face additional financial difficulties and budgetary shortfalls given the worsening economic crisis and the impact of the dramatic increase in foreclosures and changing property values on local tax revenues. *See* Legislative Petitioners' Br. 2. In this climate, a rational and equitable state funding structure that serves as an appropriate backstop when local funds may be inconsistent or lacking is critically important.

In the wake of HB 2064, Arizona cannot demonstrate that violations of federal laws will not continue to recur. *Cf. United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (holding that an injunction requires a "necessary determination . . . that there exists some cognizable danger of recurrent violation"), and Rule 60(b)(5) relief was thus properly denied.

III. Petitioners Otherwise Fail to Identify a Significant Change in Law or Fact Warranting Rule 60(b)(5) Relief.

To grant relief under the equitable prong of Rule 60(b)(5), a court must determine that a legally significant change in factual conditions or in law has occurred. *Agostini v. Felton*, 521 U.S. 203, 215 (1997); *Rufo*, 502 U.S. at 384. Apart from HB 2064, which does not justify relief for the reasons set forth above, petitioners have not met their burden of identifying a sufficient legal or factual basis for Rule 60(b)(5) relief.

In *Rufo*, this Court identified three types of changes in fact that might warrant modification: (1) "when changed factual conditions make compliance with [a consent decree or an injunction] substantially more onerous"; (2) when a decree or injunction "proves to be unworkable because of unforeseen obstacles"; or (3) "when enforcement of the decree without modification would be detrimental to the public interest." *Rufo*, 502 U.S. at 384. Modification is not permitted simply because "it is no longer convenient to live with the [prior court orders'] terms." *Rufo*, 502 U.S. at 383.

Here, petitioners do not allege that changed circumstances have made compliance more "onerous" or "unworkable"; rather, the alleged improvements in ELL programs and funding have made compliance easier. Indeed, petitioners identify no obstacles nor barriers to compliance; and, provided they correct the violations of federal law described *supra* in Part I, the state could readily take the steps necessary to support adequately its chosen ELL programs—as the

district court noted in its October 10, 2007 order following denial of Rule 60(b)(5) relief. J.A. 89-90. The district court's view that compliance was so close at that time suggests that Rule 60(b)(5) relief was (and remains) entirely unnecessary.

Petitioners fail to demonstrate—indeed, they do not seriously argue—that enforcement of the district court's prior orders would be "detrimental to the public interest." *Rufo*, 502 U.S. at 384. Certainly they suggest nothing comparable to the circumstances in which this Court determined such a modification would be appropriate in *Rufo*—*i.e.*, a modification to avoid pretrial release of accused violent felons. *Id.* at 384-85. To the contrary, the public interest strongly supports the continuation of this litigation until the state achieves compliance with the EEOA.

Petitioners also contend that enactment of NCLB was a significant change in law providing grounds for Rule 60(b)(5) relief. *See* Superintendent's Br. 51-61; Legislative Petitioners' Br. 50-57. For the reasons explained *supra*, petitioners' claim that a state's compliance with NCLB satisfies its obligations under EEOA is curtailed by HB 2064's express violation of NCLB's requirements regulating use of federal funds. In any event, NCLB does not render impermissible those obligations placed on the state by the EEOA, nor does it make legal the state's continued failure to provide a structure for supporting local school district ELL programs.[12] *See*

---

[12] For the reasons given by respondents, the NCLB statute supplements, rather than replaces, the requirements of the EEOA. *See* State Respondents' Br. 24-28; Flores Respondents Br. 48-60.

Rufo, 502 U.S. at 388. It is instructive that the Horne letter and the Title III Guidance affirm that states accepting NCLB funds remain subject to EEOA obligations and must also satisfy NCLB's requirements.[13] NCLB does not, therefore, constitute a significant change in law warranting modification, as contemplated under *Rufo*. *See id.* at 388-90.

IV. The District Court's Denial of Rule 60(b)(5) Relief Was Consistent with Principles of Federalism.

Notwithstanding the assertions of petitioners and their *amici* to the contrary, the district court consistently proceeded in a manner that respected federalism concerns and took the most deferential approach in seeking state compliance with federal law. *Cf.* Superintendent's Br. 32, 39-42; Legislative Petitioners' Br. 34-36; *Amici* American Legislative Exchange Council, *et al.* Br. 11-14.

Throughout this litigation, the district court reviewed the state's ELL program structure—including its provisions to assure that local districts have the resources necessary to implement Arizona's preferred instructional models—under an arbitrary-and-capricious standard. *See* J.A. 32, 44, 46, 49, 87. This highly deferential standard of review gave the utmost respect to the decision-making autonomy of state officials. *See Frew*, 540 U.S. at 442.

---

[13] Moreover, following enactment of NCLB, the federal government has continued to pursue aggressively EEOA enforcement actions. *See* U.S. Dep't of Justice, Educational Opportunities Section, Cases on English Language Learners, *available at* http://www.usdoj.gov/crt/edo/caselist.php.

Petitioners and their *amici* incorrectly malign the decisions of the district court for "mandating dramatic increases in ELL-specific funding," requiring a "specific amount of earmarked funding," and "ignor[ing] the importance of preserving legislative appropriations authority." *See* Legislative Petitioners' Br. 50; Superintendent's Br. 43; *Amici* American Legislative Exchange Council, *et al.* Br. 16. To the contrary, the district court's orders never commanded the state to provide a specific level of incremental or earmarked funding for ELL students, but required only that the state establish a funding level rationally related to the actual costs of EEOA compliance, taking into account resources available to local school systems from other, legally available, sources. *See* J.A. 44, 87, 88. The district court repeatedly pursued the least restrictive remedy possible: merely setting deadlines and asking the state to achieve compliance by means of its own choosing.

The district court's orders were also sufficiently "flexible" to accommodate significant educational policy changes, including the shift to structured English immersion in Proposition 203. *Rufo*, 502 U.S. at 380. The district court recognized that questions of educational policy are within the competence of the political branches, and its role was only to address violations of federal law. *Flores*, 48 F. Supp. 2d at 949 ("Confronted, reluctantly, with this type of task in this case, this Court will fulfill the responsibility Congress has assigned to it without unduly substituting its educational values and theories for the educational and political decisions reserved to state or local school authorities

or the expert knowledge of educators."). Indeed, even legislative petitioners have acknowledged that the district court "left it up to the Legislature to craft a program that is not arbitrary and capricious." J.A. 72. Furthermore, to the extent that state actors have not presented a united front on the issue, the district court gave them considerable space to negotiate a means of compliance among themselves.

Federal courts are not limited to merely identifying violations of law and "hoping for compliance." *Frew*, 540 U.S. at 440; *see also Peacock v. Thomas*, 516 U.S. 349, 356 (1996) ("Without jurisdiction to enforce a judgment entered by a federal court, 'the judicial power would be incomplete and entirely inadequate to the purposes for which it is conferred by the Constitution.'" (quoting *Riggs v. Johnson County*, 73 U.S. 166, 187 (1867))). Consistent with this Court's decision in *Frew*, the district court here moved carefully with deference to the state authorities in terms of the relief it granted. 540 U.S. at 439-40. For example, it explicitly rejected certain post-judgment relief requested by the *Flores* plaintiffs because it "encroache[d] on a domain that primarily belongs to local government institutions, including the State's legislature." J.A. 38. Furthermore, the remedial action that the district court has consistently sought since 2000 is directly aimed at eliminating the state's current and ongoing violation of the EEOA, not at implementing the court's own view of what is an appropriate ELL pedagogy. *See Dowell*, 498 U.S. at 247.

Although the changes in programmatic models, alternative funding sources, and student

performance that petitioners emphasize may be relevant factors in the state's calculation of the appropriate funding level, these changes do not alter the basic fact that the state has yet to demonstrate that it has established a system for meeting its obligations under the EEOA in an effective, non-arbitrary and rational way. Accordingly, denial of Rule 60(b)(5) relief was proper.

CONCLUSION

For the foregoing reasons, as well as those outlined by respondents, the decision below should be affirmed.

Respectfully submitted,

JOSHUA CIVIN
NAACP Legal Defense & Educational Fund, Inc.
1444 I Street, NW
10th Floor
Washington, DC 20005

JOHN PAYTON
JACQUELINE A. BERRIEN
DEBO P. ADEGBILE
ANURIMA BHARGAVA
Counsel of Record
HOLLY A. THOMAS
LETICIA V. SMITH-EVANS
NAACP Legal Defense & Educational Fund, Inc.
99 Hudson Street
16th Floor
New York, NY 10013
(212) 965-2200

HARPER JEAN TOBIN
National Senior Citizens
Law Center
1444 Eye Street NW,
Suite 1100
Washington, DC 20005

JANE PERKINS
National Health Law
Program
211 N. Columbia Street
Chapel Hill, NC 27514

MARIANNE ENGELMAN LADO
New York Lawyers For
The Public Interest
151 West 30th Street
New York, NY 10001

March 25, 2009

AMICUS CURIAE BRIEF

Nos. 08-289 & 08-294

IN THE

Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT, ARIZONA PUBLIC INSTRUCTION, SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES, AND PRESIDENT OF THE ARIZONA SENATE,

Petitioners,

v.

MIRIAM FLORES, *ET AL.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE OF THE NATIONAL SCHOOL BOARDS ASSOCIATION, ARIZONA SCHOOL BOARDS ASSOCIATION, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, NATIONAL EDUCATION ASSOCIATION, AND ARIZONA EDUCATION ASSOCIATION IN SUPPORT OF RESPONDENTS

FRANCISCO M. NEGRÓN, JR.
GENERAL COUNSEL
NAOMI GITTINS
THOMAS HUTTON
LISA SORONEN
NATIONAL SCHOOL BOARDS ASSOCIATION
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722

MAREE F. SNEED*
JOHN W. BORKOWSKI
JESSICA ELLSWORTH
RUBY Z. SHELLAWAY
HOGAN & HARTSON LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6416

* Counsel of Record
Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF AMICI CURIAE 1

INTRODUCTION 5

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. ARIZONA'S INADEQUATE FUNDING OF EDUCATIONAL PROGRAMS FOR ENGLISH LANGUAGE LEARNERS VIOLATES THE EEOA 9

A. Arizona Fails To Provide Local School Districts With The Resources Necessary For ELL Students To Overcome Language Barriers 9

B. Educational Research Supports The Ninth Circuit's Determination That Arizona's ELL Students Require Additional Resources 15

II. THE DECISION BELOW IS FULLY CONSISTENT WITH OUR NATION'S TRADITION OF LOCAL CONTROL OF PUBLIC EDUCATION 19

A. The Federal Courts' Longstanding Interpretation Of The EEOA Gives Local Authorities Ample Discretion 20

B. Arizona's Failure To Adequately Fund Its Chosen Method Of Education For ELL Students Makes A Mockery Of The Idea Of Local Control 22

TABLE OF CONTENTS—Continued

Page

C. The Federal Courts Have An Important Role In Protecting Meaningful Local Control 25

III. NCLB DID NOT REDUCE OR ABOLISH THE LEGAL PROTECTION THE EEOA AFFORDS TO ENGLISH LANGUAGE LEARNERS 27

A. NCLB And The EEOA Have Very Different Purposes 28

B. Nothing In The Text Or Legislative History Of NCLB Suggests It Was Intended To Amend Or Abolish The EEOA Or Disturb This Court's Ruling In *Lau* 32

C. Petitioners' Bizarre Interpretation Of NCLB Would Undermine The EEOA And This Court's Ruling In *Lau* 34

CONCLUSION 36

TABLE OF AUTHORITIES

Page

CASES:

Alliance for Children v. *City of Detroit Pub. Sch.*, 475 F. Supp. 2d 655 (E.D. Mich. 2007)..... 30

Arlington Cent. Sch. Dist. Bd. of Educ. v. *Murphy*, 548 U.S. 291 (2006)..... 3, 36

Ass'n of Cmty. Orgs. for Reform Now v. *New York City Dep't of Educ.*, 269 F. Supp. 2d 338 (E.D.N.Y. 2003) 30

Bd. of Educ. of Okla. City Pub. Sch. v. *Dowell*, 498 U.S. 237 (1991)..... 3

Bradley v. *Milliken*, 540 F.2d 229 (6th Cir. 1976) 35

Castaneda v. *Pickard*, 648 F.2d 989 (5th Cir. 1981) ..... *passim*

Cook County, Ill. v. *U.S. ex rel. Chandler*, 538 U.S. 119 (2003)..... 33

Dayton Bd. of Educ. v. *Brinkman*, 433 U.S. 406 (1977)..... 20

Fitzgerald v. *Barnstable Sch. Comm.*, 129 S. Ct. 788 (2009)..... 3

Forest Grove Sch. Dist. v. *T.A.*, 523 F.3d 1078 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 987 (2009)..... 3

Fresh Start Acad. v. *Toledo Bd. of Educ.*, 363 F. Supp. 2d 910 (N.D. Ohio 2005) 30

TABLE OF AUTHORITIES—Continued

Page

Gomez v. *Ill. State Bd. of Educ.*, 811 F.2d 1030 (7th Cir. 1987) 11

Griffith v. *County Sch. Bd.*, 377 U.S. 218 (1964) 26

Hagen v. *Utah*, 510 U.S. 399 (1994) 33

Hull v. Albrecht, 950 P.2d 1141 (Ariz. 1997) 24

Keyes v. *Sch. Dist. No. 1, Denver, Colo.*, 576 F. Supp. 1503 (D. Colo. 1983) 11

Lau v. *Nichols*, 414 U.S. 563 (1974) ..... *passim*

Leslie v. *Bd. of Educ. for Ill. Sch. Dist. U-46*, 379 F. Supp. 2d 952 (N.D. Ill. 2005) 31

Milliken v. *Bradley*, 418 U.S. 717 (1974) 20, 23

Milliken v. *Bradley*, 433 U.S. 267 (1977) 27, 35

Morse v. *Frederick*, 551 U.S. 393 (2007) 3

Newark Parents Ass'n v. *Newark Pub. Sch.*, 547 F.3d 199 (3rd Cir. 2008) 30

Parents Involved in Cmty. Sch. v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) 3

Plyler v. *Doe*, 457 U.S. 202 (1982) 5

Schaffer v. *Weast*, 546 U.S. 49 (2005) 3, 36

State ex rel. Woods v. *Block*, 942 P.2d 428 (Ariz. 1997) 25

TABLE OF AUTHORITIES—Continued

Page

Teresa P. v. *Berkeley Unified Sch. Dist.*, 724 F. Supp. 698 (N.D. Cal. 1989) 11

United States v. *Texas*, 572 F. Supp. 2d 726 (E.D. Tex. 2008) 28

STATUTES:

20 U.S.C. §§ 1400, *et seq.* 35

20 U.S.C. § 1701 ..... passim

20 U.S.C. § 1703 ..... 9, 29

20 U.S.C. § 1706 ..... 9, 29

20 U.S.C. § 6314(a)(2)(B) 14

20 U.S.C. § 6623(b) 14

20 U.S.C. § 6812(8) 29

20 U.S.C. § 6821-26 30-31

20 U.S.C. § 6825(g) 14

20 U.S.C. § 6842 30-31

20 U.S.C. § 6847 33

20 U.S.C. § 7709(a)(1)(B) 14

20 U.S.C. § 7902 ..... 14, 15

Ariz. Rev. Stat. § 15-751(5) 10

Ariz. Rev. Stat. § 15-756.11(E) 15

Ariz. Rev. Stat. §§ 15-756.01(I)(1)-(3) 14-15

TABLE OF AUTHORITIES—Continued

Page

No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 ..... *passim*

Tex. Educ. Code § 29.053 21

CONSTITUTIONAL PROVISION:

Ariz. Const. art. XI, § 1 24

LEGISLATIVE MATERIALS:

H.B. 2064 ..... 10, 12, 19

Hearing 107-479 Before the Sen. Comm. On Health, Education, Labor, and Pensions 9 (May 23, 2002) 27

Statement of Sen. Kennedy, Sen. Hearing 107-479 Before the Sen. Comm. on Health, Education, Labor, & Pensions at 9 (May 23, 2002) 19

Testimony of Michael A. Resnick, Associate Executive Director, National School Boards Association Before the House Comm. on Educ. & Labor, Discussion Draft of No Child Left Behind Reauthorization (Sept. 10, 2007) 13

RULES:

Fed. R. Civ. P. 60(b) 16, 19

Fed. R. Civ. P. 60(b)(5) 19

Sup. Ct. R. 37.3(a) 1

TABLE OF AUTHORITIES—Continued

Page

Sup. Ct. R. 37.6 1

REGULATION:

Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11,595 (July 18, 1970) 28

OTHER AUTHORITIES:

A Synthesis of Research of Reading Instruction for English Language Learners, 75 Rev. of Educ. Research (Summer 2005) 10

American Federation of Teachers, *Where We Stand: English Language Learners* (2006) 10

Ariz. Ass'n for Bilingual Educ., *Be An Informed Voter; Some Facts About Bilingual Education In Arizona* (2006) 10

Ariz. Ctr. for Pub. Pol'y, *What Does Arizona's ELL Population Look Like, and How Are They Doing?* (June 2006) 14

Bruce J. Biddle & David C. Berliner, *What Research Says About Unequal Funding for Schools in America*, Ariz. State Univ. Educ. (Winter 2002) 16, 17, 18

Gary Burtless, *Does Money Matter? The Effect of School Resources on Student Achievement and Adult Success* (Burtless, ed. 1996) 17-18

TABLE OF AUTHORITIES—Continued

Page

Debra K. Davenport, State of Arizona Office of the Auditor General, *Baseline Study of Arizona's English Language Learner Programs and Data Fiscal Year 2007* (Apr. 2008) 3-4

Eric A. Hanushek, *The Failure of Input-Based Schooling Policies*, The Economic Journal (Feb. 2003) 17

Ginger Thompson, *Where Education and Assimilation Collide*, N.Y. Times, March 15, 2009 ..... 3, 4

Helen F. Ladd & Janet S. Hansen, eds., *Making Money Matter: Financing America's Schools* (Nat'l Research Council 1999) 17, 18

Kellie Rolstad *et al.*, *Weighing the Evidence: A Meta-analysis of Bilingual Education in Arizona*, 29 Bilingual Research J. 43 (Spring 2005) 10

Michael A. Rebell & Joseph Wardenski, *Of Course Money Matters: Why the Arguments to the Contrary Never Added Up*, Campaign for Fiscal Equity (Jan. 2004) 16, 17

National Center for Educational Statistics, *Revenues and Expenditures for Public Elementary and Secondary Education: School Year 2006-2007* (Fiscal Year 2007) 25

TABLE OF AUTHORITIES—Continued

Page

Policy Update on Schools' Obligations Toward National Origin Minority Students with Limited-English Proficiency, U.S. Dept. of Educ. (Sept. 27, 1991) 11

Remade in America: The Newest Immigrants and Their Impact, N.Y. Times, March 15, 2009 3

Stephen Krashen *et al.*, *Review of "Research Summary and Bibliography for Structured English Immersion Programs" of the Arizona English Language Learners Task Force* (Oct. 2007) 10

U.S. Dep't of Health, Education, and Welfare and U.S. Office of Education, *Equality of Educational Opportunity* (1966) 16

IN THE

Supreme Court of the United States

Nos. 08-289 & 08-294

THOMAS C. HORNE, SUPERINTENDENT, ARIZONA PUBLIC INSTRUCTION, SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES, AND PRESIDENT OF THE ARIZONA SENATE,

Petitioners,

v.

MIRIAM FLORES, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF AMICI CURIAE OF THE NATIONAL SCHOOL BOARDS ASSOCIATION, ARIZONA SCHOOL BOARDS ASSOCIATION, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, NATIONAL EDUCATION ASSOCIATION, AND ARIZONA EDUCATION ASSOCIATION IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST OF AMICI CURIAE[1]

---

[1] Pursuant to Sup. Ct. R. 37.3(a) counsel for *amici* states that the parties have consented to the filing of this brief. Pursuant to Sup. Ct. R. 37.6, counsel for *amici* states that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

The National School Boards Association ("NSBA") is a federation of state associations of school boards from throughout the United States, the Hawai'i State Board of Education, and the board of education of the U.S. Virgin Islands. Together with these members, NSBA represents over 95,000 school board members who, in turn, govern over 14,000 local school districts that serve more than 49.8 million public school students—approximately 90 percent of the elementary and secondary students in the nation.

The Arizona School Boards Association ("ASBA") is one of the member associations that comprise NSBA. ASBA is a non-profit corporation providing assistance to the more than 240 Arizona school boards that are its members. ASBA serves 95 percent of Arizona's public school districts, and those districts serve over 1.12 million children.

The American Association of School Administrators ("AASA"), founded in 1865, is the professional association of over 14,000 local school system leaders across America. AASA members range from chief executive officers, superintendents and senior level school administrators to cabinet members, professors and aspiring school system leaders. AASA's mission is to support and develop effective school administrators who are dedicated to the highest quality education for all children.

The National Education Association ("NEA") is a nationwide employee organization with more than 3.2 million members, the majority of whom are employed as teachers by public school districts, colleges, and universities.

The Arizona Education Association ("AEA") represents more than 30,000 public school educators and education support professionals throughout Arizona. AEA members include teachers, counselors, speech pathologists, and student teachers.

NSBA and the other *amici* regularly represent their members' interests before Congress and federal and state courts and have participated as *amicus curiae* in cases before this Court involving issues of importance to educators. *See, e.g.*, *Fitzgerald* v. *Barnstable Sch. Comm.*, 129 S. Ct. 788 (2009); *Forest Grove Sch. Dist.* v. *T.A.*, 523 F.3d 1078 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 987 (2009) (Case No. 08-305); *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291 (2006); *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Morse* v. *Frederick*, 551 U.S. 393 (2007); *Schaffer* v. *Weast*, 546 U.S. 49 (2005); *Bd. of Educ. of Okla. City Pub. Sch.* v. *Dowell*, 498 U.S. 237 (1991).

The education of English language learners ("ELLs") is one of the most important issues currently faced by *amici*. The United States has recently experienced the "greatest surge in immigration since the early 20th century." *Remade in America: The Newest Immigrants and Their Impact*, N.Y. Times, March 15, 2009, at A16. As a result, there are more than 5 million students in the Nation's public schools who are non-native English speakers. *See* Ginger Thompson, *Where Education and Assimilation Collide*, N.Y. Times, March 15, 2009, at A1. Approximately, one in ten students is an ELL. *Id.* In Arizona, 14 percent of public school students are ELLs. *See* Debra K. Davenport, State of Arizona Office of the Auditor General, *Baseline*

Study of Arizona's English Language Learner Programs and Data Fiscal Year 2007, at i (Apr. 2008). Moreover, as immigration patterns have changed in the last decade, school districts throughout the Nation in communities that previously did not have significant numbers of language minority students now are faced with issues that states like Arizona, California, and Texas have addressed for many years. *See* Thompson, *supra*, at A1. At the same time that the number of ELL students is dramatically increasing and immigrants are spreading throughout the country, state, federal, and locally initiated education reform efforts also have raised the expectations for school districts, administrators, teachers, and students. *Id.* *Amici* all embrace these daunting challenges.

NSBA, ASBA, AASA, NEA and AEA strongly believe that public schools must provide comprehensive programs to serve the special needs of ELL students and must provide equal opportunity to all students, regardless of their primary language. To this end, *amici* support the vigorous enforcement of the Equal Educational Opportunity Act of 1974, 20 U.S.C. §§ 1701 *et seq.* ("EEOA"). They further believe that all levels of government must provide adequate funding for instructional materials, resources, and programs for ELL students, including professional development for education employees who work with such students.

Arizona students, like those throughout the Nation, now come to public schools speaking many different primary languages, including Spanish, Navajo, Vietnamese, and many others. *Amici* believe that programs that effectively promote English

acquisition are vital to providing these students an equal opportunity to learn. The State of Arizona's persistent failure to provide even minimally adequate funding and support for the education of English language learners violates the EEOA. The court below correctly recognized that Arizona's ELL students deserve and are entitled to an opportunity to succeed—not a continuing legacy of neglect.

INTRODUCTION

This Court has long recognized "the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child." *Plyler* v. *Doe*, 457 U.S. 202, 221 (1982). "[E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all" and "has a fundamental role in maintaining the fabric of our society." *Id.* And there can be no dispute about the "significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests." *Id.*

In 2000, the District Court for the District of Arizona ruled that Arizona was violating the EEOA because the State's funding for English language instruction for non-native speakers bore no rational relationship to the incremental cost of educating ELL students. Pet. App. 10a-15a. It issued an injunction compelling compliance with the EEOA. In 2006, one named defendant—the Superintendent of Public Instruction—and two intervenors—the Speaker of the Arizona House and the President of the State Senate—sought relief from that injunction. The State of Arizona and the Arizona State Board of Education, however, did not contest the injunction

because they acknowledged that the State remained out of compliance with the EEOA. Pet. App. 4a-5a, 28a.

When the District Court held a hearing, the evidence showed that the State had shifted to a different method of teaching ELL students—Structured English Immersion ("SEI")—and had enacted statutes providing for the *possibility* that some small amount of additional monies might be appropriated, although that has not happened. Even these provisions, however, would allow school districts to receive much of the ELL funding for a maximum of only two years per student, an arbitrary limitation given the fact that most ELL students require more time to master English. Pet. App. 103a, 106a-109a. The trial court found no cause to lift the injunction: The State still had not complied with the court's order and had instead implemented an ELL program that violated the EEOA in a number of ways. Pet. App. 113a-116a. Compliance would occur when the State put in place a funding system that did not violate federal law and that "rationally relates funding available to the actual costs of all elements of ELL instruction." Pet. App. 111a.

The Ninth Circuit affirmed. It found no abuse of discretion in the District Court's conclusion that Arizona's level of ELL funding bore no rational relationship to the costs of providing meaningful educational opportunities to students with limited English proficiency. Pet. App. 64a-67a. Arizona's funding for the incremental cost of educating ELL students continued to be arbitrary and capricious because it bore no rational relationship to the actual

costs or time involved in ensuring that ELL students have meaningful and equal access to the educational program offered. Pet. App. 97a.

The court of appeals also rejected Petitioners' novel theory that the No Child Left Behind Act of 2001 ("NCLB"), Pub. L. No.107-110, 115 Stat. 1425, eliminated the students' rights under the EEOA. *See* Pet. App. 72a-80a; *see also* Pet. App. 73a n.42 (noting belatedness of Petitioners' argument).

SUMMARY OF ARGUMENT

This case presents the question whether the EEOA continues to provide ELL students with the educational rights initially recognized by the Office for Civil Rights in its 1970 memorandum and subsequently ratified and enforced by this Court in *Lau* v. *Nichols*, 414 U.S. 563 (1974). Petitioners assert that the EEOA was effectively repealed when Congress enacted NCLB. Not so.

The EEOA permits Arizona to adopt whatever method of teaching ELL students English that it wants—including the controversial SEI approach that it adopted in 2006—so long as that method provides ELL students with a meaningful opportunity to participate in the school's educational program. But the State also must provide school districts and teachers with the resources necessary to implement its chosen approach. *See Castaneda* v. *Pickard*, 648 F.2d 989, 1009-10 (5th Cir. 1981). If the Court does not require at least this, it will effectively be endorsing the do-nothing approach rejected decades ago in *Lau*.

The federal courts play a unique role in enforcing the EEOA and other civil rights laws enacted over

the past five decades to ensure equal educational opportunities. This special and longstanding role includes ensuring non-discriminatory treatment for minority groups, including language minority students. It is well-settled, moreover, that judicial remedies for constitutional and federal statutory violations may affect the manner in which state and local governments manage and fund public education systems. With ELL populations growing in more states and school districts nationwide, this would be a particularly inopportune time for the Court to abdicate its crucial responsibility in this regard.

Petitioners attempt to evade the District Court's clearly correct factual finding that Arizona fails to provide local school districts with the resources necessary to effectively assist ELL students in learning English and gaining meaningful access to the regular curriculum by distorting the relationship between NCLB and both the EEOA and Title VI of the Civil Rights Act of 1964. While NCLB changed the accountability standards for receipt of certain federal funds by requiring states to annually assess and report student progress toward academic proficiency, nothing in that Act suggests it was intended to change the EEOA in any way. To the contrary, NCLB focuses on measuring educational outcomes, while the EEOA addresses educational inputs, requiring states and school districts to take appropriate action to ensure that students facing language barriers have meaningful access to the school curriculum.

Neither Petitioners' disingenuous invocation of local control nor their distortion of NCLB should

cloud the issue: Arizona's funding failures violate the EEOA.

ARGUMENT

I. ARIZONA'S INADEQUATE FUNDING OF EDUCATIONAL PROGRAMS FOR ENGLISH LANGUAGE LEARNERS VIOLATES THE EEOA.

A. Arizona Fails To Provide Local School Districts With The Resources Necessary For ELL Students To Overcome Language Barriers.

1. Petitioners' intimation to the contrary notwithstanding, this case simply does not implicate Arizona's right to choose an instructional method or set educational policies for its ELL students, nor would an affirmance encourage district courts to improperly interfere in those decisions. Speaker of the Arizona House of Representatives and President of the Arizona Senate Petitioners' Br. ("Speaker Pet'rs Br.") at 1, 7, 28, 31, 33. This litigation for years has instead sought to ensure adequate funding under the EEOA for the State's chosen instructional method.[2]

---

[2] After declaring it the policy of the United States that "all children enrolled in public schools are entitled to equal educational opportunity," 20 U.S.C. § 1701, the EEOA provides in pertinent part:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—
> * * * (f) [failing] to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

While Arizona adopted a highly controversial method of instruction when it passed H.B. 2064 in 2006, that is the State's prerogative under *Castaneda*, 648 F.2d at 1009. SEI is now the State's instructional method. *See* Ariz. Rev. Stat. § 15-751(5). As the State defines it, SEI is an English language acquisition process in which nearly all classroom instruction is in English, but the curriculum and presentation are designed for children who are learning the language. Although there is disagreement over the relative efficacy of SEI,[3] whether SEI is based on a sound educational theory is not at issue in this case, and both the Fifth Circuit in *Castaneda* and the District Court here correctly recognized that the EEOA "leave[s] state and local authorities a substantial amount of

---

Id. § 1703. It expressly grants a private right of action to "[a]n individual denied an equal educational opportunity." *Id.* § 1706; *see also Castaneda*, 648 F.2d at 1009 (The EEOA "grant[s] limited English speaking students a private right of action to enforce that obligation.").

[3] *See, e.g.*, Stephen Krashen *et al.*, *Review of "Research Summary and Bibliography for Structured English Immersion Programs" of the Arizona English Language Learners Task Force* 3 (Oct. 2007), *available at* http://www.asu.edu/educ/sceed/azell/review.doc; Ariz. Ass'n for Bilingual Educ., *Be An Informed Voter; Some Facts About Bilingual Education In Arizona*, (2006) (citing statistics from the Arizona Department of Education), *available at* http://azbilingualed.org/ AZ%20Hist-ALEC/flyer2.rtf; American Federation Of Teachers, *Where We Stand: English Language Learners* 9 (2006); Kellie Rolstad, *et al.*, *Weighing the Evidence: A Meta-analysis of Bilingual Education in Arizona*, 29 Bilingual Research J. 43, 43-67 (Spring 2005); *A Synthesis of Research of Reading Instruction for English Language Learners*, 75 Rev. of Educ. Research 247 (Summer 2005).

latitude in choosing the programs and techniques." *Castaneda*, 648 F.2d at 1009.

The obligations of states and school districts under the EEOA, however, do not stop with the mere selection of an approach. In addition to being based on sound educational theory, an ELL program must be adequately funded, among other things to provide appropriately trained personnel to implement the program, and must undergo periodic evaluations of its effectiveness. *See Castaneda*, 648 F.2d at 1009-10; *see also* Policy Update on Schools' Obligations Toward National Origin Minority Students with Limited-English Proficiency, United States Dep't of Educ. (Sept. 27, 1991) (explaining that *Lau* compliance reviews look to whether students with limited English proficiency have "meaningful" and "equal" access to the school's programs; explaining that the Department applies the standard articulated in *Castaneda*, 648 F.2d 989).[4]

2. Although the State has the right under the EEOA to choose its own ELL instructional method, it must fund that instruction at a meaningful level. *Castaneda*, 648 F.2d at 1010. Arizona's ELL funding levels, however, are far lower than SEI instruction requires. The trial court found that the State's funding for non-native speakers was "not reasonably calculated to effectively implement the educational theory" that the State had approved, and this factual finding is unassailable. Pet. App. 147a.

---

[4] *Accord Gomez* v. *Ill. State Bd. of Educ.*, 811 F.2d 1030, 1041 (7th Cir. 1987) (following *Castaneda* framework); *Teresa P.* v. *Berkeley Unified Sch. Dist.*, 724 F. Supp. 698, 713 (N.D. Cal. 1989) (same); *Keyes* v. *Sch. Dist. No. 1, Denver, Colo.*, 576 F. Supp. 1503, 1510 (D. Colo. 1983) (same).

At the eight-day hearing held by the District Court, five different Arizona school districts provided evidence that their current ELL instructional costs ranged between $1,570 and $3,300 per pupil. Arizona also conducted its own studies in 2004, relying in part on panels of State and national experts. The national expert panel recommended a range of spending, based on the degree of a student's need for help and grade level, from $1,026 per pupil for low-need students at the high school level to $2,571 for high-need elementary school students. The State expert panel recommended spending $1,785 in per pupil incremental costs in grades K-2, and $1,447 in grades 3-12. Pet. App. 19a.

Arizona, however, currently provides only about $340 per ELL student, and would only provide $450 under H.B. 2064. Pet. App. 22a.[5] These amounts are from one-sixth to one-half of what the State's own experts recommended. Pet. App. 19a. In fact, Arizona's cost study from 20 years ago showed that even then, ELL instruction required more than $450 in incremental expenditures per student—well over $1000 in today's dollars. Pet. App. 149a, 177a-178a. By any measure, Arizona's current funding levels are insufficient to "ensure that [ELL] students are achieving mastery of the State's specified 'essential skills.'" Pet. App. 17a.[6]

---

[5] H.B. 2064 expressly conditions this minor increase on a finding that it constitutes "appropriate action" under the EEOA. H.B. 2064 § 15(A).

[6] In addition to the cost of per-pupil instruction, Arizona also requires school districts to test ELL students' English proficiency at least once a year and to submit the test result

3. In addition, Arizona's two-year limit on ELL-funding also is arbitrary and capricious because most ELL students need more than two years to achieve English proficiency, a fact that is uncontestable on this record. All of Arizona's per-pupil ELL funding stops once a student has been classified as an ELL for two years, regardless of whether that student has reached English proficiency. As the Ninth Circuit correctly observed, "there is absolutely no evidence in the record to support the proposition that a student's need for ELL programs invariably vanishes after two years of instruction: Instead the evidence is squarely to the contrary." Pet. App. 84a-85a.

Most ELL students do not achieve proficiency in two years.[7] Even Petitioners' expert witness stated that "some children will certainly require more time" than two years to become proficient in English. Pet. App. 109a. Other witnesses confirmed that data for ELL students in specific Arizona school districts show that ELL students take more than two years to become proficient; in Nogales, for example, students take, on average, between four and five years to become proficient in English. Pet. App. 108a. In Tucson, the average is 4.6 years. *Id.* at 45a.

---

data to the State. No State funding is provided to support the performance of these tasks.

[7] *See, e.g.*, Testimony of Michael A. Resnick, Associate Executive Director, National School Boards Association, Before the House Comm. on Educ. & Labor, Discussion Draft of No Child Left Behind Reauthorization (Sept. 10, 2007) ("For determining AYP, the bill should recognize research findings that ELL students frequently take four to seven years to become proficient in 'academic English,' the language skills needed in the classroom.").

A recent study of six Arizona school districts found that, after two years in ELL programs, only 22.3 percent of students were English proficient. After four years, only 32.4 percent of students were English proficient. Ariz. Ctr. for Pub. Pol'y, *What Does Arizona's ELL Population Look Like, and How Are They Doing?* 5 (June 2006). Thus, the vast majority of Arizona's ELL students—more than three-quarters of them—take more than two years to reach English proficiency. Arizona's two-year cut off of ELL funding clearly bears no rational relationship to effective implementation of the State's chosen method of ELL instruction.

4. In addition to drastically underfunding ELL education in Arizona and arbitrarily cutting off access to even the limited funding provided, the State also creates additional financial problems for school districts, because its funding scheme blatantly violates several provisions of federal education law and thus endangers federal aid to both the State and local school districts.

Federal law prohibits a school district from using Title I, IIA, III and Impact Aid monies to reduce the amount of money it receives from other sources. *See* 20 U.S.C. §§ 6314(a)(2)(B), 6623(b), 6825(g), 7709(a)(1)(B). Furthermore, the law applying to all of the pertinent federal grant programs provides that "[a] State shall not take into consideration payments under this chapter * * * in determining the eligibility of any [school district] in that State for State aid, or the amount of State aid, with respect to free public education of children." 20 U.S.C. § 7902.

Arizona directly violates these anti-supplanting laws by requiring school districts to reduce their

requests for State ELL funding by a percentage of the federal funding they receive. *See* Ariz. Rev. Stat. §§ 15-756.01(I)(1)-(3), 15-756.11(E). Under federal law, however, even if a school district does or can use some federal money for ELL programs, the State cannot legally reduce its funding of ELL instruction based on the federal funds. *See, e.g.*, 20 U.S.C. § 7902. During the District Court's evidentiary hearing, the State's own expert, a 29-year veteran of the United States Department of Education, testified that he had "never seen such a blatant violation" of federal anti-supplanting laws. Pet. App. 106a.

B. Educational Research Supports The Ninth Circuit's Determination That Arizona's ELL Students Require Additional Resources.

Regardless of which estimate in the record the Court relies upon, it is indisputable that educating ELL students requires some additional resources and that Arizona's funding falls far short of even the lowest estimates of necessary per-pupil expenditures. Petitioners, however, suggest that Arizona's current shortfall in ELL funding has become immaterial because "broad evidence" supposedly shows that "significantly expanding financial resources" does not help American schoolchildren. Speaker Pet'rs Br. 9. This claim is both false and irrelevant.

First, Petitioners grossly misstate the current state of research regarding school funding. While there is an active debate among researchers regarding the extent to which resources matter, there is a consensus directly contrary to what Petitioners assert: There is no question that at some level, resources do matter.

Second, Petitioners' argument is also irrelevant because none of the cases or studies they cite addresses the unique instructional needs of ELL students. Finally, even if general educational theory had changed and it was established that appropriate educational resources make no difference in teaching English to ELL students, such a generic shift in social science consensus would not constitute changed circumstances under Rule 60(b).

1. Scholars largely agree that educational resources do matter. Since the 1960s, substantial academic research and judicial analysis has overwhelmingly debunked the notion that additional resources do not matter for educational results.

Back then, an influential sociologist, James Coleman, posited that money spent on education to raise children out of poverty had little effect. *See* United States Department of Health, Education, and Welfare and United States Office of Education, *Equality of Educational Opportunity* (1966). In the years since then, however, numerous scholarly works have highlighted significant methodological flaws in Coleman's analysis. *See* Michael A. Rebell & Joseph Wardenski, *Of Course Money Matters: Why the Arguments to the Contrary Never Added Up* at 9, Campaign for Fiscal Equity, Inc. (Jan. 2004), *available at* http://www.cfequity.org/MoneyMatters Feb2004.pdf; *see also* Bruce J. Biddle & David C. Berliner, *What Research Says About Unequal Funding for Schools in America* at 6, Arizona State University Education Policy Reports Project (Winter 2002) (discussing major errors in Coleman's report) *available at* http://epsl.asu.edu/eprp/EPRP_2002_ Report.htm.

Hundreds of additional studies also have demonstrated the effects of school-system inputs (such as additional funding) on school-system outputs (educational results). *See* Helen F. Ladd & Janet S. Hansen, eds., *Making Money Matter: Financing America's Schools* 140-141 (Nat'l Research Council 1999). Petitioners, however, rely on the work of a single economist, Eric Hanushek, as educational gospel, misusing Hanushek's work to argue that there is no point in providing additional resources to ELL students in Arizona because greater resources would not improve results. *See* Speaker Pet'rs Br. 9, 47.[8] However, several economists and researchers have strongly questioned Hanushek's methodologies and findings and have reached the opposite conclusion: Resources do matter for student achievement. *See* Biddle, *What Research Says About Unequal Funding for Schools in America*, *supra*, at 6-7; *see also* Ladd, *Making Money Matter*, *supra*, at 142-143; Gary Burtless, *Does Money Matter? The Effect of School Resources on*

---

[8] Even Hanushek himself, although finding no systematic relationship between spending per pupil and student performance, has not interpreted his findings to mean that additional school resources could *never* be effectively used to improve performance. *See, e.g.*, Eric A. Hanushek, *The Failure of Input-Based Schooling Policies*, The Economic Journal (Feb. 2003) ("It is important to understand what is and what is not implied by this conclusion [that no systematic relationship exists]. First, it does not mean that money and resources *never* matter. There clearly are situations where small classes or added resources have an impact.") (emphasis in original); *see also* Burtless, *Does Money Matter?*, *supra*, at 22; Rebell, *Of Course Money Matters*, *supra*, at 12-13. Hanushek concedes that researchers in some cases have convincingly shown that additional resources were used effectively to obtain better results. Burtless, *Does Money Matter?*, *supra*, at 22.

Student Achievement and Adult Success at 9, 15 (Burtless, ed. 1996).

Among other critiques, scholars have pointed out that Hanushek's methods introduce bias and rely on inaccurate proxies when attempting to understand, for example, the importance of class size. *Id.*; *see also* Ladd, *Making Money Matter*, *supra*, at 142-143. Those scholars who have corrected for these errors have found that, contrary to Hanushek's conclusions, "the relationship between resources and student achievement is significant and generally large." *Id.* at 143; *see also* Biddle, *What Research Says About Unequal Funding for Schools in America*, *supra*, at 7 (citing the work of economist Alan Krueger finding a positive relationship between reduced class size and student achievement after accounting for biases in Hanushek's work).

Petitioners also incorrectly suggest that NCLB represents the validation of their imagined consensus that educational resources are irrelevant. To the contrary, increased federal funding was a cornerstone of the legislative compromise leading to the enactment of NCLB. As one of the Act's key sponsors explained:

> The new education reform bill * * * placed substantial new demands on local schools, teachers, and students. Students will be tested on more challenging curricula and schools and teachers will be held accountable for results. But schools cannot achieve high standards on low budgets. We have an obligation to match new education reforms with new resources.

Statement of Sen. Kennedy, Sen. Hearing 107-479 Before the Sen. Comm. on Health, Education, Labor, & Pensions at 9 (May 23, 2002) (referring to NCLB).

2. Even if there were some consensus that, generally, educational resources do not matter, it would be irrelevant to this case. Here, the evidence underlying the District Court's findings relates to the cost of particular services for ELL students. The studies relied upon by Petitioners in this Court do not specifically address ELL students at all.

Moreover, even if Petitioners' theory about educational resources not affecting educational outcomes were correct as to ELL instruction or a recent phenomenon—neither of which is true—such a change in educational theory would not constitute changed circumstance under Rule 60(b)(5). Petitioners failed to prove in the District Court that some changed circumstances in Arizona today make educational resources irrelevant to ELL education. As the Ninth Circuit recognized, Arizona refused to prepare and adopt a study of ELL costs even though it had been ordered to do so by the District Court. Pet. App. 56a.

Under Rule 60(b), if Petitioners wished to present an educational theory and evidence to suggest that funding *was* adequate, as it stood or under HB 2064, the District Court was the appropriate place to present that evidence. Petitioners did not do so, and the District Court found, based on the evidence before it, that the level of funding Arizona provided "was not reasonably calculated to effectively implement" the State's chosen ELL educational theory. Petitioners' new and misleading discussion

of general theories of education funding provides no basis for disturbing this finding.

II. THE DECISION BELOW IS FULLY CONSISTENT WITH OUR NATION'S TRADITION OF LOCAL CONTROL OF PUBLIC EDUCATION.

This Court has repeatedly underscored the importance of locally elected school boards in guiding the fates of students within their districts. *See Milliken* v. *Bradley*, 418 U.S. 717, 741-742 (1974) (noting that "no single tradition in public education is more deeply rooted than local control over the operation of schools"); *see also Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 410 (1977) (stating that "local autonomy of school districts is a vital national tradition"). Petitioners, however, pervert the idea of local control in arguing that the federal courts may not require states to comply with federal civil rights laws if such compliance costs money. The tradition of local control does not justify allowing state entities to abdicate their statutory obligations. Rather, it requires both state and local entities to remain responsive to their constituents and to comply with federal law in a manner that respects the interests of local communities.

A. The Federal Courts' Longstanding Interpretation Of The EEOA Gives Local Authorities Ample Discretion.

Mindful of federal courts' obligation "to fulfill the responsibility Congress has assigned to us without unduly substituting our educational values and theories" for that of state or local authorities, the *Castaneda* framework was designed to provide states

with ample discretion in crafting special programs for ELL students. 648 F.2d at 1009. Under this longstanding precedent, the authority of states and local school districts is appropriately broad.

In examining "the soundness of the educational theory" adopted by a state or school district, federal courts are not concerned with "discerning the relative merits of sound but competing bodies of expert educational opinion, for choosing between sound but competing theories is properly left to the educators and public officials charged with responsibility for directing the educational policy of a school system." *Id.* Thus, while Arizona has adopted a highly controversial method of educating ELL students (*supra* II.A.1.), other states, such as Texas, have opted for bilingual education programs. *See* Tex. Educ. Code § 29.053. Federal courts will not question the wisdom of a state's selected method, so long as the method is not a sham or has not proven to be a failure. *Castaneda*, 648 F.2d at 1010. Indeed, the *Castaneda* court refused to find that a school system failed to fulfill its statutory obligations because it opted to "focus first on English language development and later [provide] students with an intensive remedial program to help them catch up in other areas of the curriculum." *Id.* at 1011-12. The court held that schools were free "to determine the sequence and manner in which limited English speaking students" are taught, provided that the program was reasonably calculated to remove language barriers within a reasonable length of time. *Id.*

In short, the federal courts' consistent interpretation of the EEOA is carefully calibrated to

respect—rather than to abrogate—local control. The courts have recognized that "Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations under the EEOA." *Id.* at 1009. Yet, Congress "deliberately placed on federal courts the difficult responsibility of determining whether that obligation had been met." *Id.*

B. Arizona's Failure To Adequately Fund Its Chosen Method Of Education For ELL Students Makes A Mockery Of The Idea Of Local Control.

As discussed above, *supra* II.A, Arizona's failure to adequately fund the method that it has chosen for ELL instruction gives local school districts and teachers an impossible task: Educate a growing population of non-native speakers without adequate resources or training. School districts must find meaningful ways to teach these students under the EEOA, and under NCLB they will be held accountable for any failure to do so effectively. Yet, Petitioners claim the State has no responsibility to provide them with the necessary tools to do the job. This is a strange notion of "local control."

Our Nation's tradition of local control of public education is first and foremost about enabling local school boards to respond to the needs of their students, parents, and communities. This Court has extolled the virtues of local control as it "affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for

educational excellence.'" *Milliken* 418 U.S. at 742. As residents of the communities they serve, school board members have unique expertise about the curricular, human, and financial resources necessary to educate *their* students. Arizona's school boards, administrators and teachers know what their ELL students need, and the State is not providing resources adequate to the task.

Under Arizona law, ELL students must be instructed in English across all academic subject areas. To ensure that substantive subject areas—such as science, history, social studies, and math—have *any* meaning to students with limited English-proficiency, ELL students must be taught using SEI. Teachers must be specially trained in this method and must continue to receive training after obtaining their initial SEI certification. Simultaneously, schools must provide "English as a Second Language" ("ESL") instruction to teach ELL students to speak, read, and write in the English language. Based on their expertise, school districts have determined that the most effective ELL programs provide students with properly certified and trained ESL and SEI teachers and teachers aides, devote a substantial amount of time each day to ESL instruction by ESL-certified teachers, and maintain smaller SEI classrooms to provide ELL students with an adequate level of individualized attention. Without such resources, school boards, administrators, and teachers all fear that ELL students will be condemned to "classroom experiences wholly incomprehensible and in no way meaningful." *Lau*, 414 U.S. at 566.

The District Court did nothing more than require Arizona to provide local districts with the means of effectively implementing the method of ELL instruction mandated by the State itself. Moreover, not only did the District Court defer to Arizona's chosen method of ELL instruction, but it also tailored its limited remedy to fit the overall education funding scheme adopted by the State. For example, Arizona's Constitution requires a system for equalizing school funding so that local school districts with lower tax bases do not fall too far behind more affluent districts. *See* Ariz. Const. art. XI, § 1; *Hull v. Albrecht*, 950 P.2d 1141, 1145 (Ariz. 1997). The lower court's approach mirrors this State policy decision by requiring that Arizona ensure local districts have the ability to meet minimum State-wide standards for ELL instruction.

Rather than acknowledge that local school districts require additional resources to implement the State's chosen method of ELL instruction, Petitioners suggest that any increase in per-pupil ELL funding would somehow "create perverse incentives for schools to keep ELL students languishing in special-language programs." Speaker Pet'rs Br. at 64. Petitioners' suggestion is absurd. As discussed above, Arizona itself mandates SEI, and not separate language programs, as the instructional approach for ELL students. In addition, NCLB imposes sanctions on schools and school districts whose ELL students do not make adequate yearly progress. Third, Arizona currently provides only a small fraction of the per-pupil ELL funding actually needed. Fourth, Arizona provides

very low overall education funding compared to other states.[9]

The inadequacy of resources to meet the needs of Arizona students is thus the true "flinty reality" facing the State's local school districts. Speaker Pet'rs Br. 47. Some districts will scrape by with the bare minimum in ELL funding. Others will continue to make the difficult decision to spend funds on ELL instruction that would have otherwise been allocated to general educational services. Both scenarios are potentially devastating for Arizona's school districts and the children they serve. And neither provides *any* "incentive" for school districts to keep their students in ELL classes a moment longer than necessary. Nor would either scenario provide a sustainable method of achieving or maintaining legal compliance or educational success.

Finally, Petitioners' arguments about local control are also ironic, since the Petitioners are not in fact the appropriate representatives of the State of Arizona. The legislative representatives are precluded by the Arizona Constitution from representing the State's interests in litigation. *See State ex rel. Woods* v. *Block*, 942 P.2d 428, 434-37 (Ariz. 1997). Likewise, the State Superintendent's position conflicts with that of both the State itself and the Arizona State Board of Education. Thus,

---

[9] In fact, according to a 2007 report from the United States Department of Education, Arizona ranks 50th out of the 50 states and the District of Columbia in per pupil expenditures. *See* National Center for Educational Statistics, *Revenues and Expenditures for Public Elementary and Secondary Education: School Year 2006-2007* at 14 (Fiscal Year 2007), *available at* http://nces.ed.gov/pubs2009/ 2009337.pdf.

while Petitioners attempt to drape themselves in the honorable mantle of "local control," they not only have taken positions directly contrary to the interests of locally elected school boards throughout Arizona, but also are not even appropriate representative of the State's interests.

C. The Federal Courts Have An Important Role In Protecting Meaningful Local Control.

While state and local authorities have primary authority over education funding decisions as well as educational policies, Petitioners are wrong to suggest that federal courts are powerless to ensure effective remedies for constitutional or statutory violations whenever those remedies may cost money. This Court has consistently rejected such arguments.

The federal courts' power to direct states to fund court-ordered remedies has been most clearly articulated in the school desegregation context. One of the strongest statements in this regard was made in the early case of *Griffith* v. *County School Board*, 377 U.S. 218, 233 (1964), where the Court invalidated a school district's scheme to evade the desegregation mandate of *Brown* v. *Board of Education* by closing down all of its public schools and using public funds to support private schools open only to white students. The Court held that the district court had the power to order the county to operate and fund a full public school system:

> The District Court[ ] may if necessary to prevent further racial discrimination, require the [county] Supervisors to exercise the power * * * to reopen, operate, and maintain without racial

> discrimination, a public school system in Prince Edward County, like that operated in other counties in Virginia. [*Id.* at 233.]

Similarly, in *Milliken* v. *Bradley*, 433 U.S. 267 (1977), the Court again upheld the power of the federal district courts to impose funding obligations on state and local authorities: "Federal courts [may] enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury." *Id* at 289.

Today the task of effectively educating growing populations of English language learners is as challenging and significant as was the job of remedying the decades of discrimination against African American students. Both the growing population of non-native speaking students and the Nationwide diaspora of ELLs make this responsibility among the most critical educational challenges faced by local school boards, administrators and teachers. In light of these challenges, this Court should not abdicate the established role of the federal courts in supporting meaningful local control with respect for educational and civil rights.

III. NCLB DID NOT REDUCE OR ABOLISH THE LEGAL PROTECTION THE EEOA AFFORDS TO ENGLISH LANGUAGE LEARNERS.

Petitioners resort to distortion in an attempt to evade the District Court's clearly correct factual finding that Arizona fails to provide local school districts with the resources necessary to effectively

assist ELL students in learning English and gaining meaningful access to the regular curriculum. They argue that NCLB defines the parameters of "appropriate action" under the EEOA. *See, e.g.*, Speaker Pet'rs Br. 51-55. But NCLB does not change in any way the protections offered to Arizona school children by the EEOA.

A. NCLB And The EEOA Have Very Different Purposes.

1. The EEOA is "a statute guaranteeing the civil rights of individual students," including English language learners. *United States* v. *Texas*, 572 F. Supp. 2d 726, 762 (E.D. Tex. 2008). It was enacted to codify both an administrative guidance from the Office for Civil Rights and a ruling by this Court: (1) in 1970, the Office for Civil Rights ("OCR") promulgated a Memorandum construing Title VI to require school districts to take "affirmative steps" to ensure that their instructional programs are open to students who otherwise would be excluded from effective participation in the districts' educational programs because they lack English language skills, *see* Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11,595 (July 18, 1970), and (2) in *Lau*, this Court held that it violates Title VI for States and school districts to deny students who are English language learners "a meaningful opportunity to participate in the [school district's] educational program." 414 U.S. at 568. *See also* Pet. App. 8a; *Castaneda*, 648 F.2d at 1008 (noting that the EEOA codifies the "essential holding of *Lau*, *i.e.*, that schools are not free to ignore the need of limited English speaking children for language assistance to

enable them to participate in the instructional program of the district").

To ensure that "all children enrolled in public schools are entitled to equal educational opportunity," 20 U.S.C. § 1701, the EEOA prohibits states from "[failing] to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." *Id.* § 1703. Confirming the individual rights at issue in the EEOA, Congress expressly granted a private right of action to "[a]n individual denied an equal educational opportunity." *Id.* § 1706. The EEOA thus is an individualized civil rights statute requiring school districts to offer ELL students equal educational opportunities.

2. While the EEOA focuses primarily on the "inputs" to a student's education that states and local school districts must provide, the NCLB, by contrast, focuses principally on "outputs"—specifically the percentage of students in various demographic groups that achieve proficiency on state standardized tests. One of the sub-groups measured under NCLB is ELL students. 20 U.S.C. § 6812(8) (explaining that the purpose of the statute is to hold states and school districts "accountable for increases in English proficiency and core academic content knowledge of limited English proficient children by requiring—(A) demonstrated improvements in the English proficiency of limited English proficient children each fiscal year; and (B) adequate yearly progress for limited English proficient children * * *"). Even Petitioners recognize this distinct focus. *See* Speaker Pet'rs Br. 13 (NCLB does not focus on "schooling inputs" but instead on "outputs" like requiring States

and local schools to meet "objective, measurable student performance standards"). NCLB's principal purpose is to allow the federal government to measure the effectiveness of its investment in education and provide some sanctions to promote accountability.

The Ninth Circuit correctly recognized the different purposes of NCLB and EEOA and the corollary that flows from those distinct purposes: EEOA "is an equality-based civil rights statute, while [NCLB] is a program for overall, gradual school improvement. Compliance with the latter may well not satisfy the former." Pet. App. 72a-73a. While NCLB addresses the outcomes achieved for all students in part with federal resources, EEOA addresses the services that students with limited English proficiency are entitled to receive and empowered to enforce.

NCLB also does not focus on individual rights to an equal educational opportunity, as does the EEOA. Every court to address the matter has concluded that there is no private right of action at all under NCLB. *See Newark Parents Ass'n* v. *Newark Pub. Sch.*, 547 F.3d 199, 204-214 (3d Cir. 2008); *Alliance for Children* v. *City of Detroit Pub. Sch.*, 475 F. Supp. 2d 655, 658-660 (E.D. Mich. 2007); *Fresh Start Acad.* v. *Toledo Bd. of Educ.*, 363 F. Supp. 2d 910, 914-917 (N.D. Ohio 2005); *Ass'n of Cmty. Orgs. for Reform Now* v. *New York City Dep't of Educ.*, 269 F. Supp. 2d 338, 343-348 (S.D.N.Y. 2003).

NCLB has an entirely different kind of enforcement mechanism: It provides for federally funded grants to states with federal government approved plans to benefit ELL students, so long as the grantees meet

"annual measurable achievement objectives * * * includ[ing] * * *making adequate yearly progress for limited English proficient children." 20 U.S.C. §§ 6821-26, 6842. As the court below aptly articulated, "this very gradual improvement plan does not set as an objective immediate equalization of educational opportunities for each such student"; it merely "packages federal grants with discrete, incremental achievement standards as part of a general plan gradually to improve overall performance." Pet. App. 74a.

3. The EEOA, as well as Title VI, complement NCLB by offering a rights-based framework focused on the minimum opportunities that states and school districts must offer immediately. These statutes provide ELL students the right to ensure that the schools they attend take "appropriate action" from the outset to eliminate language barriers for ELL students, and they require fair treatment for language minority students. Thus, to state a claim for an EEOA violation, ELL student-plaintiffs must allege that they "face language barriers, that the services provided to address these barriers are deficient, and that LEP [limited English proficient] students are consequently prevented from enjoying full and equal participation in instructional programs." *Leslie* v. *Bd. of Educ. for Ill. Sch. Dist. U-46*, 379 F. Supp. 2d 952, 960 (N.D. Ill. 2005).

In interpreting Title VI in *Lau*, this Court emphasized that because "[b]asic English skills are at the very core of what these public schools teach," "those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful." 414

U.S. at 566. To prevent such meaningless and unintelligible educational experiences, numerous courts have recognized that the EEOA and *Lau* require school districts to provide special programs for ELL students that afford them the opportunity for meaningful participation in the school's educational program. Specifically, such programs must be: (1) based on sound educational theory; (2) supported by adequate resources; and (3) periodically evaluated. *See Castaneda*, 648 F.2d at 1009-10.

The third *Castaneda* factor—the periodic evaluation of a program's effectiveness—is the only place where there is an actual intersection between the two laws: The outcome data from NCLB may provide valuable information about whether appropriate actions have been taken. *See* Pet. App. 80a n.46 (noting that compliance with NCLB may be "somewhat probative" of EEOA compliance). But this is the only actual interplay that occurs between these two very distinct statutes.

B. Nothing In The Text Or Legislative History Of NCLB Suggests It Was Intended To Amend Or Abolish The EEOA Or Disturb This Court's Ruling In *Lau*.

Petitioners read the NCLB to repeal by implication both the EEOA and *Lau*, and they urge the Court to hold that NCLB, *sub silentio*, defines the parameters of "appropriate action" for EEOA compliance. Speaker Pet'rs Br. 52-54. The threshold problem with this argument is that "[i]t is simply not plausible that Congress intended to repeal" the rights of ELL students to seek meaningful access to education programs *sub silentio* by the very Act it

passed to strengthen the Government's hand" in ensuring increased accountability for the educational outcomes for ELL students. *Cook County, Ill.* v. *U.S. ex rel. Chandler*, 538 U.S. 119, 133-134 (2003).

Congress presumably is well aware of "the general rule that repeals by implication are disfavored," *Hagen* v. *Utah* 510 U.S. 399, 416 (1994), yet it gave absolutely no indication that it intended to repeal the EEOA's protections for ELL students. The far more logical reading of the two statutes is that one addresses the access in place on the front end and one addresses the results on the back end: The EEOA requires that a school district have programs in place to ensure meaningful and equal access for ELL students, while NCLB requires measurement of the effectiveness of the programs in terms of whether groups of students, schools and school districts make "adequate yearly progress" ("AYP") towards 100 percent proficiency.

Petitioners' repeal by implication argument notably rests on nothing in the text or legislative history of NCLB. Indeed, the text of the statute actually supports Respondents because it makes clear that "nothing" in the statute relating to ELL student outcomes "shall be construed in a manner inconsistent with any Federal law guaranteeing a civil right." 20 U.S.C. § 6847. Thus, the obligations enforceable under the EEOA, as well as under *Lau*, remain in full effect.[10]

---

[10] NCLB also officially expired on November 30, 2007. While it was automatically extended in its current form until a reauthorization is passed or other legislative action is taken, it is unlikely to be reauthorized in its current form.

Nothing in the NCLB undermines, abrogates, or changes the legal obligation under the EEOA to take affirmative steps to ensure equal access for all students, including ELL students. The EEOA is concerned with the current rights of individual students; NCLB is concerned with ensuring gradual improvement over time at the school and district level. Pet. App. 75a. As the court below aptly recognized, these two statutes work together to ensure that "[a]n individual student whose needs are not being met under the EEOA need not wait for help just because, year after year, his school as a whole makes 'adequate yearly progress' towards improving academic achievement overall, including for ELL students." *Id.*

C. Petitioners' Bizarre Interpretation Of NCLB Would Undermine The EEOA And This Court's Ruling In *Lau*.

Petitioners' position is that, whenever a state submits a plan under NCLB that is approved by the United States Department of Education, thereby permitting federal funding to flow to the state, federal courts cannot find that the state or a local school district is failing to take "appropriate action" under the EEOA to ensure that ELL students have meaningful and equal access to academic programs. This turns the protections of the EEOA and *Lau*—protections afforded to *individual* students—on their head. Under Petitioners' theory, individual students no longer would have any right of access to a meaningful education. That is so because NCLB measures progress by *schools* and *school districts*, not by *individual* students. Thus, if an individual student is attending a school that is making

adequate yearly progress, the *individual* student would no longer be entitled to access to a meaningful education, but instead could be condemned to a classroom experience that is "wholly incomprehensible and in no way meaningful." *Lau*, 414 U.S. at 566.

Petitioners' approach also would permit states to require school districts to divert general education funding—thereby placing school district officials in the untenable situation of being able to provide a meaningful education for ELL students only by cutting aspects of the general education program available to all students. "In 2000, as today, ELL incremental costs *could* be covered by diverting basic educational support, hampering the state's ability to provide a basic education to all Arizona students." Pet. App. 70a. So, a State could underfund ELL programs and force a school district to choose between base level needs and ELL programs. *Id.* However, as Justice Powell acknowledged in a similar context, "[a]ny attempt to redistribute available resources will cause further deterioration in on-going educational programs and will merely result in robbing Peter to pay Paul." *Milliken* v. *Bradley*, 433 U.S. 267, 272 n.3 (1977) (J. Powell concurring) (quoting *Bradley* v. *Milliken*, 540 F.2d 229, 251 (6th Cir. 1976)). Such a "Hobson's choice" is far from acceptable under the EEOA or *Lau*.

The absurdity of Petitioners' argument about the primacy of NCLB can also be seen by comparing the EEOA with another federal education law with which this Court regularly grapples, the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, *et seq.* ("IDEA"). Petitioners claim that the NCLB

abrogates the rights of ELL students protected by the EEOA because NCLB requires states and school districts to test students facing language barriers. Applying this argument to the IDEA context, one would be compelled to conclude that the NCLB also abrogates the rights of disabled students protected by the IDEA because NCLB requires the testing of students with disabilities. Obviously, such a conclusion is irreconcilable with Congress' broad mandate set forth in the IDEA and this Court's numerous decisions enforcing that statute.[11] The same rationale applies with equal force to the EEOA.

Yet, Petitioners would have the Court declare that, so long as the State has an NCLB-approved plan for federal funding, ELL students who are being denied access to a meaningful educational program have no legal redress. The EEOA and *Lau* compel a contrary conclusion.

---

[11] This Court has repeatedly addressed IDEA in the eight years since NCLB was enacted without once suggesting that NCLB had supplanted IDEA. *See, e.g., Arlington Cent. Sch. Dist. Bd. of Educ.*, 548 U.S. at 291; *Schaffer*, 546 U.S. at 49.

CONCLUSION

For the foregoing reasons, the Court should affirm the Ninth Circuit's decision.

Respectfully submitted,

FRANCISCO M. NEGRÓN, JR.
GENERAL COUNSEL
NAOMI GITTINS
THOMAS HUTTON
LISA SORONEN
NATIONAL SCHOOL BOARDS ASSOCIATION
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722

Of Counsel

MAREE F. SNEED*
JOHN W. BORKOWSKI
JESSICA L. ELLSWORTH
RUBY Z. SHELLAWAY
HOGAN & HARTSON LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6416

* Counsel of Record
Counsel for Amici Curiae

AMICUS CURIAE BRIEF

12

(10) (13)

Nos. 08-289 & 08-294

Supreme Court, U.S.
FILED
FEB 25 2009
OFFICE OF THE CLERK

In the

Supreme Court of the United States

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES and PRESIDENT OF THE ARIZONA SENATE,

Petitioners,

v.

MIRIAM FLORES, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND EVERGREEN FREEDOM FOUNDATION IN SUPPORT OF PETITIONERS

MICHAEL REITZ
Evergreen Freedom Foundation
P.O. Box 552
Olympia, Washington 98507
Telephone: (360) 956-3482
Facsimile: (360) 352-1874

SHARON L. BROWNE
*STEVEN GEOFFREY GIESELER
**Counsel of Record*
Pacific Legal Foundation
1002 SE Monterey Commons Boulevard, Suite 102
Stuart, Florida 34996
Telephone: (772) 781-7787
Facsimile: (772) 781-7785

Counsel for Amici Curiae

BOTH 4 CVTOK

Sloan B 19

QUESTIONS PRESENTED

1. By interpreting the phrase "appropriate action" under Section 1703(f) of the Equal Education Opportunity Act as a requirement that the State of Arizona provide for a minimum amount of funding specifically allocated for English Language Learner programs statewide, did the Ninth Circuit violate the doctrine prohibiting federal courts from usurping the discretionary power of state governments to determine how to appropriately manage and fund their public education systems?

2. Should the phrase "appropriate action" as used in Section 1703(f) of the Equal Education Opportunity Act be interpreted consistently with the No Child Left Behind Act of 2001, where both Acts have the same purpose with respect to English Language Learners and the NCLB provides specific standards for the implementation of adequate English Language Learner programs, but the EEOA does not?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. ARIZONA'S EDUCATION POLICY SATISFIES THE EEOA'S "APPROPRIATE ACTION" MANDATE 4

II. THIS COURT SHOULD ALLOW ARIZONA TO CONDUCT ITS NOVEL SOCIAL EXPERIMENT TO MANAGE ITS EDUCATION SYSTEM 9

CONCLUSION 13

TABLE OF AUTHORITIES

Page

Cases

Alexander v. Sandoval, 532 U.S. 275 (2001) 1, 8

Almendares v. Palmer,
284 F. Supp. 2d 799 (N.D. Ohio 2003) 8

Brown v. Bd. of Educ., 347 U.S. 483 (1954) 3, 10

California Teachers Ass'n v. State Bd. of Educ.,
271 F.3d 1141 (9th Cir. 2001) 2

Castaneda v. Pickard,
648 F.2d 989 (5th Cir. 1981) 3-5, 7

Chandler v. Miller, 520 U.S. 305 (1997) 12

Fitzgerald v. Barnstable Sch. Comm.,
129 S. Ct. 788 (2009) 1

Gomez v. Ill. State Bd. of Educ.,
811 F.2d 1030 (7th Cir. 1987) 5

Guadalupe Org., Inc. v. Tempe Elementary Sch. Dist. No. 3, 587 F.2d 1022 (9th Cir. 1978) 4-5

Honig v. Doe, 484 U.S. 305 (1988) 3, 10

Jefferson v. Hackney, 406 U.S. 535 (1972) 11

Keyes v. Sch. Dist. No. 1, Denver, Colo.,
576 F. Supp. 1503 (D. Colo. 1983) 5, 11

Lau v. Nichols, 414 U.S. 563 (1974) 8

Lewis v. Casey, 518 U.S. 343 (1996) 11

Milliken v. Bradley, 418 U.S. 717 (1974) 11

Missouri v. Jenkins, 515 U.S. 70 (1995) 12

TABLE OF AUTHORITIES—Continued

Page

New State Ice Co. v. Liebmann,
285 U.S. 262 (1932) 10

Parents Involved in Comty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) 1

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987) . . . 10

Quiroz v. State Bd. of Educ.,
No. Civ. S-97-1600WBS/GGH, 1997 WL 661163
(E.D. Cal. Sept. 10, 1997) 5, 11

R.R. Comm'n of Texas v. Pullman Co.,
312 U.S. 496 (1941) 10

San Antonio Indep. Sch. Dist. v. Rodriguez,
411 U.S. 1 (1973) 11

Sch. Bd. of Palm Beach County v. Survivors Charter Schs., Inc., No. SC07-2402 1

Teresa P. v. Berkeley Unified Sch. Dist.,
724 F. Supp. 698, (N.D. Cal. 1989) 5

United States v. Lopez, 514 U.S. 549 (1995) . . . 9-10

Valeria G. v. Wilson,
12 F. Supp. 2d 1007 (N.D. Cal. 1998) . . . 2, 5-6, 11

Valeria v. Davis, 307 F.3d 1036 (9th Cir. 2002) 2

Younger v. Harris, 401 U.S. 37 (1971) 10

Federal Statute

20 U.S.C. § 1703(f) 3-5, 8

TABLE OF AUTHORITIES—Continued

Page

Rules

Supreme Court Rule 37 1

37.3(a) 1

37.6 1

IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) and Evergreen Freedom Foundation respectfully submit this brief amicus curiae in support of Petitioners Speaker of the Arizona House of Representatives and President of the Arizona Senate.[1]

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF attorneys have represented amici in this Court in recent education cases, including *Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788 (2009), and *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007). PLF has participated as amicus curiae in numerous state supreme courts in support of states' education innovations, including in the pending Florida Supreme Court case of *Sch. Bd. of Palm Beach County v. Survivors Charter Schs, Inc.*, No. SC07-2402. PLF attorneys also represented amici in *Alexander v. Sandoval*, 532 U.S. 275 (2001), wherein this Court upheld a state's administration of certain English-only policies. In addition, PLF attorneys have been instrumental in defending Proposition 227, the sister

---

[1] Pursuant to this Court's Rule 37.3(a), counsel for all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

initiative to Arizona's Proposition 203. Both voter initiatives replaced bilingual education programs with programs designed to teach students in English. PLF attorneys participated in *Valeria v. Davis*, 307 F.3d 1036 (9th Cir. 2002) (representing parents of English learners); *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007 (N.D. Cal. 1998) (representing the California State Board of Education); and *California Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141 (9th Cir. 2001) (representing parents of English learners).

The Evergreen Freedom Foundation, founded in 1991, is a nonpartisan, public policy research organization with 501(c)(3) status, based in Olympia, Washington. The Foundation's mission is to advance individual liberty, free enterprise, and limited, accountable government. Through its Education Reform Center, the Foundation seeks to give every child the best educational opportunities possible by securing policies that allow parents to choose options that best meet the needs of their children, and to ensure that public education dollars follow those students.

Amici consider this case to be of special significance in light of its nationwide implications for the roles of local and state governments in educating students. Specifically, Amici's experience in litigating matters involving Proposition 227, along with cases addressing the paramount role of state and local governments in educating students, will provide a useful additional viewpoint to assist this Court in its consideration of this case.

SUMMARY OF ARGUMENT

The voters of the State of Arizona approved Proposition 203, the "English for the Children" statutory initiative, to dismantle the bilingual education system and immerse English learners in the English language. This democratically enacted policy complies with all applicable constitutional and statutory requirements, including the test promulgated in *Castaneda v. Pickard*, 648 F.2d 989, 1008-09 (5th Cir. 1981), the analytical framework most often used by courts to interpret the Equal Education Opportunity Act's (EEOA's) "appropriate action" mandate for English language learners. 20 U.S.C. § 1703(f). In fact, in district court proceedings in the case, the Plaintiffs' own education expert conceded that the educational strategies emanating from Proposition 203 do comport with the EEOA.

The Ninth Circuit erred in substituting its own preference for educating Arizona's students for the validly enacted policy of the people of Arizona. In so doing, the lower court abused its power by abrogating the traditional duty and authority, as recognized on numerous occasions by this Court, of state and local governments to educate their students as they see fit. *See Honig v. Doe*, 484 U.S. 305, 309 (1988) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

ARGUMENT

I

ARIZONA'S EDUCATION POLICY SATISFIES THE EEOA'S "APPROPRIATE ACTION" MANDATE

The Equal Education Opportunty Act requires that state educational agencies take "appropriate action" to remedy the educational handicaps faced by students not fluent in English. 20 U.S.C. § 1703(f). Congress left to the states the determination of what action is "appropriate." *Castaneda*, 648 F.2d at 1008-09; *Guadalupe Org., Inc. v. Tempe Elementary Sch. Dist. No. 3*, 587 F.2d 1022, 1030 (9th Cir. 1978) (holding that Congress left state and local educational authorities substantial latitude to choose programs and techniques to meet their EEOA obligations). The challenged actions of the state and local policy makers in this case reflect the lawful exercise of their statutory discretion, and the Ninth Circuit erred by substituting its policy preference in place of that lawful exercise.

Courts have applied a three-part test, first articulated by the Fifth Circuit in *Castaneda*, to determine whether an educational program meets the requirements of section 1703(f): (1) the program must be supported by an educational theory that is recognized as sound by some experts in the field, or, at least, deemed a legitimate experimental strategy; (2) the programs and practices of the school system must be reasonably calculated to effectively implement the educational theory; and (3) the program, after an appropriate period, must be evaluated for effectiveness. *Castaneda*, 648 F.2d at 1009-10. Numerous courts have adopted the *Castaneda* test, making it the

predominant analytical framework for interpreting the "appropriate action" standard. *See, e.g., Gomez v. Ill. State Bd. of Educ.*, 811 F.2d 1030, 1041 (7th Cir. 1987) (applying *Castaneda* framework as "fruitful starting point for our analysis); *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 576 F. Supp. 1503, 1510 (D. Colo. 1983) (following *Castaneda*, "a case which is very instructive in the present controversy"); *Valeria G. v. Wilson*, 12 F. Supp. 2d at 1017 ("Judicial precedent is the only guidance available to this court. . . . The leading circuit court decision on Section 1703(f) is *Castaneda v. Pickard.*").

Every court that has addressed this issue has concluded that the EEOA does not require bilingual education. In fact, as the Ninth Circuit itself held three decades ago, "the issue is whether 'appropriate action' [m]ust include the bilingual-bicultural education the appellants seek. We hold that it need not." *Guadalupe*, 587 F.2d at 1030.

A review of the record in this case reveals that the education policy choice made by the people of Arizona not only satisfies all three *Castaneda* factors, but does so in a manner markedly superior to the failing status quo imposed upon the state by the Ninth Circuit. Decisions in analogous cases in California have validated the opinions of countless education experts that view English immersion programs as sound educational policy. *See Teresa P. v. Berkeley Unified Sch. Dist.*, 724 F. Supp. 698, 703 (N.D. Cal. 1989) (holding as "sound" a program that "stress[ed] English language development intended [for students to] gain fluent English proficiency . . . as quickly as possible, in order to participate in academic classes taught in English"); *Quiroz v. State Bd. of Educ.*, No. Civ. S-97-

1600WBS/GGH, 1997 WL 661163, at *5 (E.D. Cal. Sept. 10, 1997) (California school district's plan to implement "a predominantly English curriculum" based "on the notion that language proficiency is best obtained by lingual immersion" is "within the boundaries of acceptable educational theory.").

Perhaps the most extensive judicial analysis of the efficacy of English immersion techniques was undertaken by the district court for the Northern District of California in *Valeria G.*, 12 F. Supp. 2d 1007. In upholding California's Proposition 227, requiring English immersion, against an EEOA "appropriate action" challenge, the court weighed in on the propriety of English immersion within the *Castaneda* framework:

> [D]efendants present evidence that the sheltered English immersion program of Proposition 227 is also based upon a sound educational theory, which is not only tested but is the predominant method of teaching immigrant children in many countries in Western Europe, Canada and Israel. Defendants present expert opinions that "[t]he common European model is to put all newcomers into a special reception class for one year or, in rare cases two, and then to integrate them into regular classes, with ongoing extra support as needed." They also present evidence that "the advocates and political parties which are most concerned to do justice to immigrant minorities . . . vigorously oppose assigning immigrant children to separate classes and teaching them in their home languages; seeing this as

> a well-meaning but ill-advised strategy leading inevitably to marginalization from the social and economic mainstream." Defendants further present evidence that numerous school districts in this country use structured English immersion methods.

Id. at 1018. The court, following this analysis, held that Proposition 227 satisfied the EEOA's "appropriate action" requirement, as interpreted by prong one of the *Castaneda* test.

The record in this case further reflects that the innovations approved by the people of Arizona would comport with prongs two and three of the *Castaneda* test, while the policies preferred by the Ninth Circuit have miserably failed Arizona's students. The fundamental premise and promise of Proposition 203 are that the open-ended commitment to policies failing Arizona students would be foregone in favor of an innovative system of accountability based on concrete benchmarks for achievement. *See* Petition for Certiorari of Thomas C. Horne at 6 (noting that Proposition 203's enactment led to "significantly lower class sizes, qualified teachers, an abundance of teaching materials, tutoring, and intervention strategies"); Petition for Certiorari of Speaker of the House of Arizona at 14-15 (describing accountability standards).

Without a doubt, the policies chosen by Arizona's citizens to educate their children comply with the EEOA, a conclusion that Plaintiffs' own expert witness at trial did not challenge. *Id.* ("[E]very expert, including Plaintiffs' own witness, testified that by 2006, NUSD conducted effective ELL programs and

met the requirements of § 1703(f)."). Still, the court below found the programs implemented by the school district were in violation of the EEOA.

The contortions necessary for the lower court to support its holding are perhaps best illustrated by the court's reference to *Lau v. Nichols*, 414 U.S. 563 (1974). Yet *Lau* cannot support the weight the Ninth Circuit puts on it. In *Lau*, this Court examined a Health and Human Services regulation promulgated under Title VI and held that a school district violated the regulation by failing to give equal education opportunities to students of Chinese ancestry who did not speak English. While this Court held that the students were entitled to relief, it pointed out: "No specific remedy is urged upon us. Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another." *Id.* at 564-65.

Lau does not stand for the proposition that school districts must provide bilingual education programs to students who lack proficiency in English. In *Alexander*, 532 U.S. 275, this Court reaffirmed that Title VI "'proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.'" *Id.* at 280-81 (citation omitted). Language is not an included classification. In discussing *Lau*, this Court wrote that "we have since rejected *Lau*'s interpretation of § 601 as reaching beyond intentional discrimination." *Id.* at 285.[2] Thus,

---

[2] *Almendares v. Palmer*, 284 F. Supp. 2d 799, 804 n.4 (N.D. Ohio 2003), recognized that because of *Alexander*, *Lau* is no longer good law.

the Ninth Circuit in the opinion below relied upon a case interpreting a provision not at issue here.

II

THIS COURT SHOULD ALLOW ARIZONA TO CONDUCT ITS NOVEL SOCIAL EXPERIMENT TO MANAGE ITS EDUCATION SYSTEM

The court below prescribed substantive standards and policies for institutions whose governance is properly reserved to state and local educational agencies, which are better able to assimilate and assess the needs of students in this field. In *United States v. Lopez*, Justice Kennedy wrote that "it is well established that education is a traditional concern of the States." 514 U.S. 549, 580 (1995) (Kennedy, J., concurring). This insight is a part of a larger universe of this Court's cases recognizing that government is composed of sovereign units entitled to a certain amount of latitude in order to experiment with novel solutions to social and political problems. The idea that federalism allows the states to conduct novel, often bold, social, economic, and educational experiments was perhaps most eloquently expressed by Justice Brandeis:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This

> Court has the power to prevent an experiment. . . . But, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (footnote omitted).[3]

Returning to *Lopez* and the education context, Justice Kennedy echoed Justice Brandeis's prescription for the Court. "In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." 514 U.S. at 581. His is an observation followed, and presaged, by numerous federal courts recognizing that education is "'perhaps the most important function of state and local governments.'" *Honig*, 484 U.S. at 309 (quoting *Brown*, 347 U.S. at 493).

To make this observation a reality, federal courts must be careful, lest they overstep their bounds by deciding matters of education policy where matters of

---

[3] This Court has expressed similar sentiments on numerous occasions. In *R.R. Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 501 (1941), this Court described the desirability of federal courts "exercising a wise discretion," and restraining their authority in order to give "scrupulous regard for the rightful independence of the state governments and for the smooth working of the federal judiciary." Similarly, in *Younger v. Harris*, 401 U.S. 37, 44 (1971), this Court explained that federal courts should consciously limit their own powers–in this case, by declining to exercise jurisdiction–based on the notion of "a proper respect for state functions." *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 10 (1987).

law are settled, and "assume responsibility for making the difficult policy judgments that state officials are both constitutionally entitled and uniquely qualified to make." *Lewis v. Casey*, 518 U.S. 343, 385 (1996) (Thomas, J., concurring). "'[T]he legislature's efforts to tackle [education] problems' should be entitled to respect,"*San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973) (quoting *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972)), because "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools." *Milliken v. Bradley*, 418 U.S. 717, 741 (1974).

Federal courts specifically interpreting the "appropriate action" to overcome language barriers mandate established by the EEOA also have recognized the paramount role played by state and local governments in the educational arena. These courts have recognized that they "are ill-equipped to perform and . . . are often criticized for . . . prescribing substantive standards and policies for institutions whose governance is properly reserved to other levels and branches of our government." *Keyes*, 576 F. Supp. at 1510. So too have these courts noted that "courts should not substitute their educational values and theories for the educational and political decisions properly reserved to local school authorities and the expert knowledge of educators." *Quiroz*, 1997 WL 661163, at *4. As the *Valeria G.* court held in upholding California's Proposition 227:

> This court's responsibility, however, is only to ascertain whether the theory underlying Proposition 227 is informed by an educational theory recognized as sound by some experts in the field or, at least is

> deemed a "legitimate experimental strategy." In light of the evidence submitted, this court must conclude that the English immersion system is a valid educational theory. This court may not go beyond that conclusion and determine whether it is the better theory.

12 F. Supp. 2d at 1019 (citation omitted).

It goes nearly without saying that while such state experimentation can be innovative and unique, it cannot contravene constitutional liberties. "These novel experiments, of course, must comply with the United States Constitution; but their novelty should not be a strike against them." *Chandler v. Miller,* 520 U.S. 305, 324 (1997) (Rehnquist, C.J., dissenting). But in the case before this Court, there are no constitutional challenges being made to Arizona's educational policy. The Ninth Circuit would have done well to heed this Court's direction in *Missouri v. Jenkins*: "[O]ur cases recognize that local autonomy of school districts is a vital national tradition, and that [the federal courts] must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution." 515 U.S. 70, 99 (1995).

Unfortunately, Arizona's bold social experiment to teach English language learners English has been usurped by the Ninth Circuit's intervention in education policy making. Amici urge this Court to recognize that Arizona's willingness to carry out this courageous experiment is simply one of the "happy incidents of federalism." This Court should allow Arizona's "novel social experiment" to proceed

unencumbered by the federal court's substituting its values for that of local school authorities.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

DATED: February, 2009.

Respectfully submitted,

MICHAEL REITZ
Evergreen Freedom Foundation
P.O. Box 552
Olympia, Washington 98507
Telephone: (360) 956-3482
Facsimile: (360) 352-1874

SHARON L. BROWNE
*STEVEN GEOFFREY GIESELER
**Counsel of Record*
Pacific Legal Foundation
1002 SE Monterey Commons Boulevard, Suite 102
Stuart, Florida 34996
Telephone: (772) 781-7787
Facsimile: (772) 781-7785

Counsel for Amici Curiae

AMICUS CURIAE BRIEF

124 MOTION FILED
MAR 2 5 2009

(28)

No. 08-294 (28)
(consolidated with No. 08-289)

IN THE
Supreme Court of the United States

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES
and PRESIDENT OF THE ARIZONA SENATE,
Petitioners,

v.

MIRIAM FLORES, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* OUT OF TIME AND BRIEF *AMICI CURIAE* OF 30 RECOGNIZED LEADERS OF EDUCATION RESEARCH IN SUPPORT OF NEITHER PARTY

A. W. PHINNEY III *
MARBREE D. SULLIVAN
BRIAN P. DUNPHY
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C
One Financial Center
Boston, MA 02111
(617) 542-6000

* Counsel of Record
Counsel for Amici Curiae

MARCH 25, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

BOTH 4ES052

Motion for Leave to File a Brief *Amici Curiae* Out of Time

The *Amici Curiae* respectfully request that the Court grant their motion to file this Brief *Amici Curiae* out of time. The *Amici* submit this brief in support of neither party to bring to the Court's attention the consensus among education researchers regarding the interplay of output-focused and input-focused education policies.

This brief is filed out of time because it responds to a contention concerning "the dominant view of scholars" on education reform made by a group of "Education Policy Scholars" in a Brief *Amici Curiae* filed in support of petitioners on February 26, 2009 – the same day a brief in support of neither party would have been due under Supreme Court Rule 37.3. As a result, the *Amici* did not and could not have become aware of this contention until after February 26, and therefore could not have filed this brief within the time allotted under Supreme Court Rule 37.3.[1/]

The *Amici* have sought and received consent of all parties to file this brief, as required by the first sentence of Supreme Court Rule 37.3(a), subject to the Court's granting of this motion.

1/ The Court recently granted a similar motion to file a brief *Amicus Curiae* in support of neither party out of time where the *Amicus* sought to respond to points made in two briefs *Amici Curiae*, one submitted on behalf of the petitioner and the other on behalf of neither party. *Caperton v. A.T. Massey Coal Company, Inc.*, No. 08-22 (motion for leave to file amicus brief out of time granted February 20, 2009).

TABLE OF CONTENTS

Page

Table of Authorities ii

Interest of *Amici Curiae* 1

Summary of Argument 10

Argument 11

I. Sound Education Policy Necessarily Focuses on Support Systems and Other Inputs in Tandem with Outcome-Based Results 11

A. Effective Education Policy Combines Standards-Based Concepts with Consideration of the Supports and Resources Necessary to Meet Those Standards 12

B. Measurement of Outcomes Should Be Used to Guide Needed and Appropriate Inputs 18

Conclusion 20

TABLE OF AUTHORITIES

Page

STATUTES AND LEGISLATIVE MATERIALS

Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1701 (2006) 11

Education Council Act of 1991, Pub. L. No. 102-62, 105 Stat. 305 (1991) 16

No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002). 10, 11

Supreme Court Rule 37.3 1

Supreme Court Rule 37.6 1

National Council on Education Standards and Testing; Notice of Meetings, 56 Fed. Reg. 59,251 (Nov. 25, 1991) 16

OTHER AUTHORITIES

American Psychological Association, *Appropriate Use of High-Stakes Testing in Our Nation's Schools* (2001) 17, 19

Comm. on Title I Testing and Assessment, Nat'l Research Council, *Testing, Teaching, and Learning: A Guide for States and School Districts* (Richard F. Elmore & Robert Rothman eds., 1999) 14, 15

Eva L. Baker & Robert L. Linn, *Validity Issues for Accountability Systems, in Redesigning Accountability Systems for Education* 47 (Susan H. Fuhrman & Richard F. Elmore eds., 2004) 17-18

Other Authorities – Continued

Page

Jaekyung Lee & Kenneth K. Wong, *The Impact of Accountability on Racial and Socioeconomic Equity: Considering Both School Resources and Achievement Outcomes*, 41 Am. Educ. Res. J. 797 (2004) 13, 19

Jennifer A. O'Day, *Complexity, Accountability, and School Improvement*, 72 Harv. Educ. Rev. 293 (2002) 13, 18

Katherine E. Ryan, *Fairness Issues and Educational Accountability, in The Future of Test-Based Educational Accountability* 191 (Katherine E. Ryan & Lorrie A. Shepard eds., 2008) 13

Linda Darling-Hammond, *Creating Standards of Practice and Delivery for Learner-Centered Schools*, 4 Stan. L. & Pol'y Rev. 37 (1993) 16

Milbrey W. McLaughlin & Lorrie A. Shepard, *Improving Education Through Standards-Based Reform: A Report By the National Academy of Education Panel on Standards-Based Education Reform* (Deborah Fife ed., 1995) 15, 16

Nat'l Ctr. for Research on Evaluation, Standards, and Student Testing, *Educational Assessment: Expanded Expectations and Challenges* (1993)..... 16

Richard F. Elmore, *Conclusion: The Problem of Stakes in Performance-Based Accountability Systems, in Redesigning*

Other Authorities – Continued

Page

Accountability Systems for Education 274 (Susan H. Fuhrman & Richard F. Elmore eds., 2004) 18, 19

Susan H. Fuhrman, *Introduction to Redesigning Accountability Systems for Education* (Susan H. Fuhrman & Richard F. Elmore eds., 2004) 13

INTEREST OF *AMICI CURIAE*[1/]

Amici submit this brief in response to the contention by a group of "Education Policy Scholars" in an *amicus* brief submitted in support of petitioners that the No Child Left Behind Act of 2001 reflects "the dominant view of scholars that educational reform should focus on student performance – the output of school systems – rather than inputs such as funding levels."[2/]

The *Amici* are distinguished and prominent scholars and researchers who are recognized leaders in the field of education policy and research, almost all of whom have been elected to the position of president of the National Academy of Education and/or of the American Educational Research Association.[3/]

1/ Pursuant to Supreme Court Rule 37.6, *Amici Curiae* state that no counsel for any party authored this brief in whole or in part and no person or entity, other than *Amici Curiae* or their counsel, made a monetary contribution to the preparation of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for Petitioners and Respondents have consented to the filing of this brief in letters that have been lodged with the Clerk's office.

2/ Brief of Education Policy Scholars as *Amicus Curiae* in Support of Petitioners, filed with this Court, February 26, 2009, at 3 ("Brief of Education Policy Scholars").

3/ The National Academy of Education, founded in 1965, advances education research and its use in policy formation and practice. Its members are elected on the basis of outstanding scholarship or contributions to education. The American Educational Research Association, founded in 1916, is an international professional organization dedicated to advancing education research and its practical application. As set forth below, *Amici* submit this brief only in their individual capacities and not on behalf of these organizations.

Amici are therefore well-positioned to speak to the views of academic experts in education policy and research.

The *Amici* seek only to discuss the prevailing views of leading scholars in the field of education research and do not offer any argument about the relationship of the Equal Educational Opportunities Act to the No Child Left Behind Act, nor of the merits or value of these Acts. The *Amici* submit this brief to offer their best judgment of the consensus among the vast majority of prominent education researchers regarding the interplay of output- and input-oriented policies.

Input-oriented policies focus on instructional quality and academic supports for learning. Output-oriented policies, such as those embodied in the No Child Left Behind Act of 2001, are focused on measured results of schooling. Based on empirical research, leading scholars in the field have concluded that education policy risks failure when it focuses predominantly on outcomes alone without giving sufficient attention to supports for student achievement and instructional quality. This is particularly true with regard to the education of at-risk groups such as the English Language Learners in the present case. Briefly stated, the position of leading scholars in the field is that well-crafted outcome- and input-based education policies are mutually reinforcing.

As recognized leaders in the field, the *Amici* have an interest in accurately representing the views of education researchers concerning the necessary balance between outcome-based education policies and the appropriate academic supports and instructional quality needed to achieve designated measures of

success. *Amici* are concerned that the importance of inputs and investments in education should not be overlooked when implementing output-focused policies.

Amici are:

Richard C. Anderson, Professor, Department of Educational Psychology, University of Illinois at Urbana-Champaign, former president of the American Educational Research Association, former chair of the National Academy of Education—National Institute of Education Commission on Reading, member of the National Academy of Education;

Eva L. Baker, Distinguished Professor of Education, University of California, Los Angeles Graduate School of Education & Information Studies, chair of the Assessment Task Force of the National Council on Education Standards and Testing, former president of the American Educational Research Association, former chair of the Board on Testing and Assessment of the National Research Council, member of the National Academy of Education;

James A. Banks, Kerry and Linda Killinger Professor of Diversity Studies and Director of the Center for Multicultural Education at the College of Education, University of Washington, Seattle, former president of the American Educational Research Association, former president of the National Council for the Social Studies, member of the National Academy of Education;

David C. Berliner, Regents' Professor, Mary Lou Fulton College of Education, Arizona State University, former president of the American Educational

Research Association, former president of the Division of Educational Psychology of the American Psychological Association, member of the National Academy of Education;

Hilda Borko, Professor, Stanford University School of Education, former president of the American Educational Research Association, member of the National Academy of Education;

Marilyn Cochran-Smith, John E. Cawthorne Professor of Education, Director, Doctoral Program in Curriculum & Instruction, Lynch School of Education, Boston College, former president of the American Educational Research Association, member of the National Academy of Education;

Larry Cuban, Professor Emeritus of Education, Stanford University School of Education, former president of the American Educational Research Association, member of the National Academy of Education;

Linda Darling-Hammond, Charles E. Ducommun Professor of Teaching and Teacher Education, Stanford University School of Education, former president of the American Educational Research Association, former executive director of the National Commission on Teaching and America's Future, member of the National Academy of Education and its executive board;

Susan H. Fuhrman, President of Teachers College, Columbia University, founding director of the Consortium for Policy Research in Education, president-elect of the National Academy of Education,

former vice-president of the American Educational Research Association;

Gene V Glass, Regents' Professor, Mary Lou Fulton College of Education, Arizona State University, former president of the American Educational Research Association, member of the National Academy of Education, director of Research and Policy, CARDET, Nicosia, Cyprus;

Patricia Albjerg Graham, Charles Warren Professor of the History of Education Emerita, Harvard University Graduate School of Education, former director of the National Institute of Education in the United States Department of Health, Education and Welfare, former president of the National Academy of Education;

Maxine Greene, Professor Emerita of Philosophy and Education, Teachers College, Columbia University, former president of the American Educational Research Association, the American Educational Studies Association, and the Philosophy of Education Society;

Kris D. Gutierrez, Professor, Social Research Methodology, University of California, Los Angeles Graduate School of Education & Information Studies, president-elect of the American Educational Research Association for 2010-2011, fellow of the Center for Advanced Study in the Behavioral Sciences, 2006-07;

Carl Kaestle, University Professor Emeritus, Professor Emeritus of Education, History and Public Policy, Department of Education, Brown University, former president of the National Academy of Educa-

tion, former vice president of the American Educational Research Association, former vice-chair of the Board of Testing and Assessment of the National Research Council;

Gloria Ladson-Billings, Kellner Family Chair in Urban Education in the Department of Curriculum & Instruction, University of Wisconsin-Madison, former president of the American Educational Research Association, member of the National Academy of Education;

Ellen Condliffe Lagemann, Charles Warren Professor of the History of American Education, Harvard University Graduate School of Education, chair of the National Research Council's Committee on Teacher Preparation, former president of the National Academy of Education;

Carol D. Lee, Professor of Learning Sciences in the School of Education and Social Policy and of African American Studies at Northwestern University, former president of the National Conference on Research in Language and Literacy, president-elect of the American Educational Research Association, member of the National Academy of Education;

Ann Lieberman, Senior Scholar, the Carnegie Foundation for the Advancement of Teaching, Stanford University, former president of the American Educational Research Association, co-founder and co-director of the National Center for Restructuring Education, Schools, and Teaching;

Robert L. Linn, Distinguished Professor Emeritus of Education, School of Education, University of Colorado at Boulder, Co-Director of the National

Center for Research on Evaluation, Standards, and Student Testing, former president of the American Educational Research Association, former president of the National Council on Measurement in Education, former chair of the National Research Council's Committee on Testing and Assessment, member of the National Academy of Education;

Milbrey McLaughlin, David Jacks Professor of Education and Public Policy, Stanford University School of Education, Director, Center for Research on the Context of Teaching, member of the National Academy of Education;

Nel Noddings, Lee L. Jacks Professor of Education Emerita, Stanford University School of Education, former president of the National Academy of Education, former president of the Philosophy of Education Society;

W. James Popham, Professor Emeritus, University of California, Los Angeles Graduate School of Education & Information Studies, former president of the American Educational Research Association;

Andrew Porter, George and Diane Weiss Professor of Education, and Dean of the Graduate School of Education, University of Pennsylvania, former president of the American Educational Research Association, vice president of the National Academy of Education;

Lauren B. Resnick, Distinguished University Professor of Psychology and Cognitive Science, Director of Learning Research and Development Center, University of Pittsburgh School of Education, former president of the American Educational Research As-

sociation, former president of the Division of Educational Psychology, American Psychological Association, member of the National Academy of Education;

Alan H. Schoenfeld, Elizabeth and Edward Conner Professor of Education, University of California, Berkeley Graduate School of Education, former president of the American Educational Research Association, former vice president of the National Academy of Education;

Richard J. Shavelson, Margaret Jacks Professor of Education, Stanford University School of Education, former president of the American Educational Research Association, fellow of the American Psychological Association, the American Psychological Society, the American Educational Research Association, the Humboldt Foundation, and the American Association for the Advancement of Science;

Lorrie A. Shepard, Dean & Professor, School of Education, University of Colorado at Boulder, president of the National Academy of Education, former president of the American Educational Research Association;

Catherine E. Snow, Patricia Albjerg Graham Professor of Education, Harvard University Graduate School of Education, former president of the American Educational Research Association, member of the National Academy of Education;

Lee S. Shulman, President Emeritus, The Carnegie Foundation for the Advancement of Teaching, Charles E. Ducommun Professor of Education Emeritus, Stanford University School of Education, former president of the American Educational Re-

search Association, former president of the National Academy of Education; and

Jane A. Stallings, Professor Emerita, College of Education, Texas A. & M. University, former president of the American Educational Research Association.

Amici are submitting this brief solely in their individual capacities. The views expressed are those of the named *Amici* only and are not necessarily the views of the institutions, organizations, or employers with which *Amici* are or have been affiliated.

SUMMARY OF ARGUMENT

The No Child Left Behind Act of 2001 (NCLB)[4/] focuses primarily on the outcome of school practices and policies and is premised on the view that outcomes must guide the direction and utilization of resources allocated to those practices and policies.

Although scholars vary in the degree to which they endorse NCLB, there is little or no dispute that adopting outcome-based policies does not, and should not, preclude consideration and utilization of input-oriented policies. Scholars generally agree that a focus on outcomes, such as test scores and graduation rates, and the strategic use of inputs, such as quality teachers and academic supports (including up-to-date textbooks, computers, and laboratories, as well as specialized programs aimed at students or mentoring programs for beginning teachers), are both important to improving student achievement – even when those scholars disagree about the particular elements or strengths of a given policy or the ideal balance between input- and output orientation.

From the vantage point of having served in the highest elected – and other leadership – positions in the field, *Amici* can state that the prevailing view among education policy scholars is that sound standards-based accountability policies should be *combined* with policies that provide the supports necessary to meet those standards. In fact, a major

---

4/ No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

assumption of the standards-based reform approach underlying NCLB is that knowledge of outcomes should guide needed and appropriate investments where achievement is lagging.

There exists no substantial dispute in the research community that high-quality academic supports increase the likelihood that educators and students will reach ambitious outcome-oriented goals. Policies concerning outcomes should not be considered independently of policies focused on investments.

ARGUMENT

I. SOUND EDUCATION POLICY NECESSARILY FOCUSES ON SUPPORT SYSTEMS AND OTHER INPUTS IN TANDEM WITH OUTCOME-BASED RESULTS.

Pending before this Court are questions related to education policy, the roles of federal and state governments in determining and utilizing effective programs and practices, and the roles of two federal statutes, the Equal Educational Opportunities Act of 1974,[5] and the No Child Left Behind Act of 2001.[6] The Court has received arguments attempting to show that one education policy is better or more accepted than another. One group in particular, composed of some "Education-Policy Scholars," makes the claim that the dominant view among education researchers and policy experts is that NCLB

---

[5] 20 U.S.C. § 1701 et seq. (2006).

[6] Pub. L. No. 107-110.

and outcome-focused education policies have supplanted or obviated the need for policies that focus on "inputs" or what supports go into school systems.[7/]

These individuals appear to suggest that attention to inputs is unnecessary and disfavored among education policy scholars. But schools cannot generate quality results or improve academic performance without identifying needs and then acquiring and allocating necessary inputs. The widely accepted view among researchers and scholars of education policy is that sound policy makes use of not just standards and outcome measures, but also corresponding, adequate, and appropriate supports for teaching and learning. The focus is not about resources or funding for their own sake but, instead, the kinds of support system that they make available, such as mentoring programs for new and relocating teachers, programs designed to improve and retain highly qualified teachers, up-to-date textbooks, computers, and laboratories.

A. Effective Education Policy Combines Standards-Based Concepts with Consideration of the Supports and Resources Necessary to Meet Those Standards.

Adopting outcome-based or accountability policies does not preclude consideration and utilization of input-oriented policies. Outcome-based policies focus on measured results of schooling, such as student

---

7/ Brief of Education Policy Scholars, *supra* note 2.

test scores and graduation rates.[8] Input-based policies focus on such elements as highly qualified teachers, up-to-date textbooks, computers and laboratories, and specialized programs aimed at students or mentoring programs for beginning teachers.[9]

"Both *resource access* and knowledge about *resource use* and *how resources are deployed* are essential to improving schools and student learning. ... Educational accountability based on this framework emphasizes high standards for all *and* makes 'conditions under which students are educated' equally important."[10]

The prevailing perspective of leading scholars is that a focus on outcomes and the strategic use of inputs are both of critical importance to improving

---

[8] *See* Susan H. Fuhrman, *Introduction to Redesigning Accountability Systems for Education* 4-9 (Susan H. Fuhrman & Richard F. Elmore eds., 2004) (discussing the development of outcome-focused education policies).

[9] *See* Jaekyung Lee & Kenneth K. Wong, *The Impact of Accountability on Racial and Socioeconomic Equity: Considering Both School Resources and Achievement Outcomes*, 41 Am. Educ. Research J. 797, 800 (2004).

[10] Katherine E. Ryan, *Fairness Issues and Educational Accountability, in The Future of Test-Based Educational Accountability* 191, 205 (Katherine E. Ryan & Lorrie A. Shepard eds., 2008) (emphasis in original; internal citations omitted); *see also* Jennifer A. O'Day, *Complexity, Accountability, and School Improvement*, 72 Harv. Educ. Rev. 293, 294 (2002) ("accountability systems will foster improvement to the extent that they generate and focus attention on information relevant to teaching and learning, motivate individuals and schools to use that information and expend effort to improve practice, build the knowledge base necessary for interpreting and applying the new information to improve practice, and allocate resources for all of the above").

student achievement. This is so even where scholars disagree about the particular elements or strengths of a given policy or how the two should be balanced.[11/]

For instance, a 1999 guide from the National Research Council presents this understanding of outcome-based reforms as being tightly linked to addressing inputs:

> Accountability should follow responsibility: teachers and administrators – individually and collectively – should be held accountable for their part in improving student performance. Teachers and administrators should be accountable for the progress of their students. Districts and states should be accountable for the professional development and support they provide teachers and schools to enable students to reach high standards.[12/]

The National Research Council authors then add the recommendation that "[a]ssistance should be aimed at strengthening schools' capacity for educating all students to high standards" and that such as-

---

11/ As the "Education-Policy Scholars" recognized, individual states may struggle to meet standards and need to reform finance policies in order to comply with the standards of NCLB. *See* Brief of Education Policy Scholars, *supra* note 2, at 17.

12/ Comm. on Title I Testing and Assessment, Nat'l Research Council, *Testing, Teaching, and Learning: A Guide for States and School Districts* 97 (Richard F. Elmore & Robert Rothman eds., 1999).

sistance should always be provided "before sanctions."[13/]

An earlier report by the National Academy of Education similarly concluded that "[e]ducators need both knowledge and expertise to proceed, as well as substantial resources for putting into practice the changes demanded by the [standards-based] reforms."[14/] That report cautioned,

> Between communities and even within the same schools, students of differing circumstances have differential access to experienced and knowledgeable teachers, to computers and books, and a classroom atmosphere focused on learning; in some communities even the most rudimentary requirements of clean, safe, and healthy school facilities are not met.[15/]

Such "[u]nequal resources contribute, in turn, to unequal results on high-stakes tests...."[16/] And "[m]erely declaring higher expectations without implementing concomitant changes in curriculum, instructional practices, and resources may doubly victimize students if and when they fall short of the standards."[17/]

13/ *Id.* at 98.

14/ Milbrey W. McLaughlin & Lorrie A. Shepard, *Improving Education Through Standards-Based Reform: A Report by the National Academy of Education Panel on Standards-Based Education Reform* 64 (Deborah Fife ed., 1995).

15/ *Id.* at 11.

16/ *Id.*

17/ *Id.* at 12.

The standards-based reform movement was in many ways launched by an Education Summit of the 50 Governors, convened in 1989 in Charlottesville, Virginia, by President George H. W. Bush.[18] Congress created the National Council on Education Standards and Testing (NCEST) in June 1991 to help implement the ideas from that summit.[19] The NCEST Standards Task Force report concluded:

> If not accompanied by measures to ensure equal opportunity to learn, national content and performance standards could help widen the achievement gap between the advantaged and the disadvantaged in our society. ... Standards and assessments *must be accompanied by policies that provide access for all students to high quality resources*, including appropriate instructional materials and well-prepared teachers.[20]

The research community has determined that high-quality academic supports are generally necessary for educators and students to reach ambitious

---

18 *See id.* at xv.

19 *See* Education Council Act of 1991, Pub. L. No. 102-62, 105 Stat. 305 (1991); National Council on Education Standards and Testing; Notice of Meetings, 56 Fed. Reg. 59,251 (Nov. 25, 1991) (explaining purpose of council); Nat'l Ctr. for Research on Evaluation, Standards, and Student Testing, *Educational Assessment: Expanded Expectations and Challenges* 7 (1993), *available at* http://www.cse.ucla.edu/products/Reports/TECH351.pdf (creation of NCEST).

20 Linda Darling-Hammond, *Creating Standards of Practice and Delivery for Learner-Centered Schools*, 4 Stan. L. & Pol'y Rev. 37, 38 (1993) (*quoting* National Council on Education Standards and Testing, *Raising Standards for American Education* 13 (1992)) (emphasis added).

outcome-oriented goals. Neither policies championing inputs nor those focused on outcomes should be considered independently. These non-controversial points have been made by many. As the American Psychological Association has pointed out:

> [T]est users must ensure that results are truly indicative of student achievement rather than a reflection of the quality of school resources or instruction. It is only fair to use test results in high-stakes decisions when students have had a real opportunity to master the materials upon which the test is based.
>
> Therefore, in conjunction with supporting the use of tests to evaluate performance, public policymakers should also support research on the consequences of such testing, and localities should work to provide the resources necessary for schools to provide quality educational opportunities and achieve real student growth and learning, not just "teaching to the test" skills acquisition.[21/]

Moreover, as two of the most respected researchers in the field have stated, policies that put in place incentives to achieve certain goals and sanctions for failing to do so

> will not necessarily enable the people in classrooms and schools ... systematically to improve learning for students who have done poorly in the past. ... [They] indeed may focus

---

21/ American Psychological Association, *Appropriate Use of High-Stakes Testing in Our Nation's Schools* (May 2001), *available at* http://www.apa.org/pubinfo/testing.html.

> attention on the bottom line, but not on needed steps or processes to get there.[22]

These scholars also point out that policy makers should not generally expect "a lack of capacity" to be "directly remedied by increased motivation to do well[.]"[23]

B. Measurement of Outcomes Should Be Used to Guide Needed and Appropriate Inputs.

A major assumption of the standards-based reform approach underlying NCLB is that knowledge of outcomes should guide needed and appropriate investments where achievement is lagging. "[O]ne of the most promising aspects of outcomes-based school accountability is the use of information to direct attention and resources where they are most needed."[24]

Testing, therefore, should be a means to an end, and not just an end in itself. It should be used to show where further support and investment are nec-

---

[22] Eva L. Baker & Robert L. Linn, *Validity Issues for Accountability Systems, in Redesigning Accountability Systems for Education, supra* note 8, at 47, 49.

[23] *Id.*

[24] O'Day, *supra* note 10, at 314; *see also* Richard F. Elmore, *Conclusion: The Problem of Stakes in Performance-Based Accountability Systems, in Redesigning Accountability Systems for Education, supra* note 8, at 274, 294 (one of the principles of designing accountability systems should be "the reciprocity of accountability and capacity – for each increment in performance I require of you, I have an equal and reciprocal responsibility to provide you with the capacity to produce that performance.").

essary. As set forth in a position statement of the American Psychological Association discussing the official *Standards for Educational and Psychological Testing*, "in many instances, without tests, low-performing students and schools could remain invisible and therefore not get the extra resources or remedial help that they need."[25] One of the primary values of testing is its ability to inform capacity-building. "Improvement can be measured, in part, by the assessments used in accountability systems, but these systems do not, in themselves, provide the capacities to improve."[26] Thus, "the actual impact of state accountability policies on academic excellence and equity may turn out to be contingent upon the level of support available to schools, teachers, and students."[27] What is needed, then, is a combination of outcome-based and input-based approaches.[28]

[*Remainder of page left blank intentionally*]

---

25 American Psychological Association, *supra* note 21.

26 Elmore, *supra* note 24, at 290.

27 Lee & Wong, *supra* note 9, at 799.

28 *Id.* at 801.

CONCLUSION

For the foregoing reasons, the *Amici Curiae* respectfully request that this Court give due consideration and appropriate weight to the necessary relationship between outcome-based and input-focused education policies in evaluating the case before it.

Respectfully submitted,

A. W. PHINNEY III*
MARBREE D. SULLIVAN
BRIAN P. DUNPHY
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
One Financial Center
Boston, MA 02111
(617) 542-6000

* Counsel of Record

Counsel for Amici Curiae

MARCH 25, 2009

AMICUS CURIAE BRIEF

Nos. 08-289 and 08-294

In The Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF ARIZONA,

Petitioner,

v.

MIRIAM FLORES, *et al.*,

Respondents.

and

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES AND PRESIDENT OF THE ARIZONA SENATE,

Petitioners,

v.

MIRIAM FLORES, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* TUCSON UNIFIED SCHOOL DISTRICT, MESA UNIFIED SCHOOL DISTRICT, SUNNYSIDE UNIFIED SCHOOL DISTRICT, TEMPE ELEMENTARY SCHOOL DISTRICT AND PHOENIX UNION HIGH SCHOOL DISTRICT IN SUPPORT OF RESPONDENTS

JOHN C. RICHARDSON
DECONCINI MCDONALD YETWIN & LACY, P.C.
2525 East Broadway Boulevard, Suite 200
Tucson, Arizona 85716
Telephone: (520) 322-5000
Facsimile: (520) 322-5585

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. Relevant Factual and Procedural Background 4

II. The District Court Has Been Careful Not to Intrude into the Legislative Realm But Has, Instead, Respected Local Control to the Greatest Degree Possible 7

III. "ELL Students Need Extra Help and That Costs Extra Money." 9

A. Arizona school districts face great challenges in educating ELL students .. 10

B. Arizona school districts require more ELL education resources than the State is currently providing 15

C. Arizona school districts should not be forced to rob from limited general education funds in order to provide adequate ELL instruction 17

IV. Neither General Funding Increases Nor HB 2064 Provide Adequate Resources for ELL Instruction 22

TABLE OF CONTENTS – Continued

Page

A. General funding increases do not solve the problem of providing equal educational opportunities to all students 22

B. HB 2064 continues to fund ELL programs arbitrarily and capriciously... 23

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Castenada v. Pickard, 648 F.2d 989 (5th Cir. 1981) 7, 20

Flores v. Arizona, 480 F.Supp.2d 1157 (D. Ariz. 2007) ("*Flores II*") 10, 19, 20, 24, 25

Flores v. Arizona, 516 F.3d 1140 (9th Cir. 2008) ("*Flores III*") 1, 13, 14, 16, 20, 25

Flores v. State of Arizona, 172 F.Supp.2d 1225 (D. Ariz. 2000) ("*Flores I*") 5, 11, 16

Jenkins v. Missouri, 639 F.Supp. 19 (W.D. Mo. 1985) 7

Youngberg v. Romeo, 457 U.S. 307 (1982) 8

STATUTES

20 U.S.C. § 1701 *et seq.* ..... *passim*

20 U.S.C. § 1703(f) 20

20 U.S.C. § 6301 3

A.R.S. § 15-905 18

A.R.S. § 15-910 23

MISCELLANEOUS

Rule 37.4, Rules of the United States Supreme Court 2

http://nces.ed.gov/pubsearch 18

TABLE OF AUTHORITIES

Page

http://www10.ade.az.gov/ReportCard/District Details.aspx?id=4457&ReportLevel=2 19

IDENTITY AND INTEREST OF *AMICI CURIAE*

Tucson Unified School District ("TUSD"), Mesa Unified School District ("MUSD"), Sunnyside Unified School District ("SUSD"), Tempe Elementary School District ("TESD") and Phoenix Union High School District ("PUHSD"), collectively "*Amici,*" support the position of the Respondents. *Amici* are Arizona school districts with significant ELL student populations. TUSD and MUSD, the two largest school districts in Arizona, educate approximately 8,000 ELL students each. SUSD, PUHSD and TESD educate approximately 5,000, 4,000, and 2,900 ELL students respectively and all have ELL student populations that significantly exceed the statewide average of ELLs as a percent of total students. *Amici* are only too aware that the State of Arizona (the "State") continues to woefully under-fund ELL programs and that no changed circumstances have ameliorated the need for funding that rationally relates to the actual cost of ELL programs.

Because *Amici* are intimately involved in the day-to-day education of ELL students, they are in the unique position of being able to offer to the Court an overview of what is required to provide adequate ELL instruction to the over 146,000 ELL students in Arizona. As demonstrated by the eight-day evidentiary hearing held in January 2007, the State's funding of ELL programs falls far below what is needed for even the most minimum requirements of a successful ELL program. *Amici* urge the Court to affirm the Ninth Circuit decision in *Flores v. Arizona*, 516

F.3d 1140 (9th Cir. 2008) ("*Flores III*"), and the District Court's March 2007 Order holding that: (1) there were and are no changed circumstances that require modification of the District Court's original judgment issued in January 2000 ("Original Judgment"); (2) the State of Arizona continues to violate the Equal Education Opportunity Act, 20 U.S.C. § 1701 *et seq.*, ("EEOA") by failing to fund ELL programs in a manner that rationally relates to the actual cost of such programs; and (3) the Arizona legislature's answer to ELL funding, House Bill 2064 ("HB 2064") continues to fund ELL programs arbitrarily and capriciously and in a manner that violates federal and state laws.

Amici file this brief pursuant to Rule 37.4, Rules of the United States Supreme Court.

SUMMARY OF THE ARGUMENT

Like Respondents the State of Arizona and Arizona State Board of Education, *Amici* believe that the supplanting provisions of HB 2064 are fatal to that legislation. Not only do those provisions put all of Arizona's federal funding at risk, they seriously impact *Amici*. The *Amici* districts each receive funding in many if not most of the categories of funding that HB 2064 requires to be offset. In addition, and as indicated above, each of the *Amici* districts educate large ELL populations. As a result, *Amici* will be directly and severely prejudiced if HB 2064 and its supplanting provisions go into full effect. Like

Respondents Flores, *et al.* and Rzeslawski ("Plaintiffs"), *Amici* believe that the No Child Left Behind Act, 20 U.S.C. § 6301 et seq., ("NCLB") and the EEOA serve different purposes: NCLB focuses on outcomes and accountability while the EEOA is a civil rights statute focusing on equal educational opportunities. In this brief, however, *Amici* will focus on the following two issues: (1) contrary to arguments made by the Petitioners, the District Court has shown appropriate deference to local control of education by the State of Arizona; and (2) Petitioners' argument that increases in general funding for education in Arizona, combined with the modest funding increases in ELL monies, obviate the need for additional funding for ELL instruction is not only wholly unrealistic, but also guarantees a discriminatory result.

First, Petitioners ask this Court to restore "local control" over Arizona's schools and argue that the District Court has interfered with the State's discretion to choose a method of compliance with the EEOA. *Amici* support the notion of local control. Throughout this case, however, the District Court has been very careful to avoid choosing the methods the State must use to comply with the EEOA. Instead, the Court has exhibited appropriate deference for local decision making and has merely required that the methods chosen by the State be funded in a way that is rational. The State, however, has been unable to demonstrate that its funding plan is in any manner rationally related to the cost of ELL instruction because, in fact, it is not.

Second, Petitioners argue that general funding increases that have relatively recently been provided to Arizona school districts, coupled with modest funding increases targeted for ELL education, constitute changed circumstances. Increases in general education funding that do little more than keep pace with inflation, however, do not satisfy the Original Judgment, and that is what school districts have received. HB 2064, a law passed by the Arizona legislature in 2006 ostensibly to comply with the Original Judgment, continues to fund ELL programs in an arbitrary, capricious and inadequate manner. Furthermore, expecting Arizona school districts with large ELL populations to fund ELL education primarily with general education funds that are barely adequate to cover basic educational needs improperly forces such school districts to choose between adequately funding ELL education and adequately funding basic educational services. For school districts such as *Amici* with large ELL populations, either option is untenable and each has a discriminatory impact on the thousands of ELL students in those districts.

ARGUMENT

I. Relevant Factual and Procedural Background.

The Original Judgment held that Arizona was in violation of the EEOA because it funded ELL

programs in an arbitrary and capricious manner. *Flores v. State of Arizona*, 172 F.Supp.2d 1225 (D. Ariz. 2000) ("*Flores I*"). In October of 2000, the District Court ordered the State to perform a cost study to determine the amount of funding necessary to adequately fund ELL programs in Arizona's public schools. To date, the State has not provided a cost study that it deems acceptable or reasonably accurate. Thus, the State has never directly determined the cost of adequately funding Arizona's ELL programs.

Because the State continued to violate the Original Judgment, the District Court issued an order in January of 2005 mandating that the State comply with the Original Judgment by the end of the then-pending legislative session "by appropriately and constitutionally funding the state's ELL programs." In March of 2006, after the District Court imposed fines on the State, the Arizona legislature passed HB 2064. Unfortunately, however, the funding scheme set forth in HB 2064 ensures that the State will never adequately fund Arizona's ELL programs.

After the District Court struck down HB 2064, Petitioners appealed and the Ninth Circuit remanded the case to the District Court for an evidentiary hearing to determine whether changed circumstances required modification of the Original Judgment. During the ensuing evidentiary hearing, Petitioners offered testimony from administrators at the Arizona Department of Education ("ADE") and Plaintiffs offered testimony from administrators from five

different Arizona school districts. The parties also submitted documents including cost sheets from school districts listing those districts' ELL instructional costs. The ELL instructional costs generally ranged between $1,500 and $3,300 per pupil, or approximately $1,100 to $2,900 more per pupil than what the State currently provides for ELL programs.

The State currently provides $365 per pupil for ELL instruction. HB 2064 increases this amount to $444 per student, but cuts this funding off completely for any ELL student receiving ELL instruction for more than two years. This cut-off of funds occurs despite the fact that both Petitioners' and Plaintiffs' witnesses agreed that many ELL students take more than two years to become proficient in English. HB 2064 allows districts to apply for additional funding, but many Arizona school districts, including all of the *Amici* districts, would either not be able to seek additional ELL funding or would have their additional funding requests drastically reduced as a result of the law's required offsets. In summary, the voluminous evidence presented at the hearing reaffirmed that the State continues to violate the EEOA because the cost of providing ELL instruction far exceeds both the current ELL appropriation and the appropriation referenced in HB 2064.

In March of 2007, the District Court correctly determined that based on the evidence received during the eight-day hearing, there were no changed circumstances that warranted modification of the Original Judgment. The District Court also reaffirmed that its

previous orders applied to the state-wide funding of ELL programs and not just to the State's funding of ELL instruction in Nogales Unified School District ("NUSD") where Plaintiffs reside because "[j]ust as the State has to consider all school districts when coming up with funds for a single district like NUSD, it is impossible to limit the effects of the judgment and the Court's Order to NUSD." *Amici* concur with all aspects of the District Court's well-reasoned order and the Ninth Circuit opinion affirming it. Without the March 2007 Order, the inadequate funding of ELL instructional programs in the State of Arizona will continue, with resulting harm to school districts and their students.

II. The District Court Has Been Careful Not to Intrude into the Legislative Realm But Has, Instead, Respected Local Control to the Greatest Degree Possible.

The Petitioners' and Superintendent's briefs are filled with hyperbole suggesting that the District Court has improperly usurped local control of Arizona school districts. The Speaker of the House and the President of the Senate cite *Jenkins v. Missouri,* 639 F.Supp. 19, 23-24 (W.D. Mo. 1985), presumably to raise the spectre of a federal court directing Arizona as to how its schools must be operated. Brief of Petitioners at p. 10. They speak of the evils of the federal government "micro-managing" school districts. *Id.* at p. 11, *see also*, p. 62. They cite *Castenada v. Pickard,* 648 F.2d 989, 1009 (5th Cir. 1981), for the proposition

that courts may not choose between sound but competing theories of educating ELLs and argue that the District Court's injunction contravenes Congressional policy that state and local officials be given flexibility to implement ELL programs that they believe are "most effective." Brief of Petitioners at p. 62. The Superintendent echoes this same theme in his brief. He demands discretion for local authorities in how to cure a federal violation, Brief of Superintendent at p. 32, and notes that it is the legislature's prerogative to determine "which of several professionally acceptable choices should have been made," *id.* at 40, quoting *Youngberg v. Romeo,* 457 U.S. 307, 321 (1982).

None of this hyperbole, however, reflects the reality of this case. The District Court has not directed the State to implement any particular ELL program. Instead, it has consistently let the State make its own choices both with respect to what type of ELL program the State desires to implement as well as how the State desires to fund the program it has selected. The State, however, has not shown how its funding scheme is related to any reasonably and professionally acceptable "choice" regarding ELL instruction. The District Court's insistence that the State reasonably demonstrate how its chosen method of ELL instruction will financially be able to be implemented is not an abuse of its discretion.

Counsel for Petitioners the Speaker of the House and the President of the Senate, Mr. David Cantelme, recently acknowledged in open court that the District Court has not intruded on the State's right to make

its own choices as to how to educate ELL students. In November of 2008, Mr. Cantelme addressed the District Court, stating, "this Court has never second-guessed, ever, the state experts in education . . . you have been very careful . . . never to substitute your judgment or your predecessor's judgment as to pedagogical issues for those of the state authorities." Transcript from 11/4/08, Day one of the November 2008 evidentiary hearing, p. 12, lines 13-15, 18-21. It is disingenuous and inaccurate for Petitioners to suggest that the District Court is "micro-managing" any aspect of the operation of Arizona school districts.

Petitioners plead for the restoration of local control and state that further litigation "would mostly serve to impose unnecessary burdens on Arizona's schools, sapping the energy and flexibility of school administrators and further draining the public fisc in a period of strained finances." Petitioners' Brief at 65. *Amici* are among the Arizona schools about which Petitioners speak and do not share Petitioners' sentiments. The District Court has merely attempted to hold Arizona responsible for providing adequate resources to enable school districts with large ELL student populations to comply with the EEOA.

III. "ELL Students Need Extra Help and That Costs Extra Money."

After listening to eight days of testimony from Arizona administrators and educators knowledgeable in the area of ELL instruction and programming, the

District Court found that "ELL students need extra help and that costs extra money." *Flores v. Arizona*, 480 F.Supp.2d 1157, 1161 (D. Ariz. 2007) ("*Flores II*"). While the Arizona legislature has at least implicitly acknowledged this fact, it continues to misapprehend the scope of resources required to provide ELL students equal education opportunities as required by the EEOA.

A. Arizona school districts face great challenges in educating ELL students.

In November of 2000, Arizona voters passed Proposition 203 mandating that all ELL students be instructed in English. With limited exceptions, this law eliminates bilingual education and requires that all instruction – both that pertaining to language development as well as academic content – be provided to ELL students in the English language. In practical terms, Proposition 203 means that school districts must provide students who have no or limited understanding of the English language with tools and services that will allow such students not only to learn English, but at the same time also to learn academic subject areas such as math, social studies, science and history.

ELL instruction is comprised of two components. One component is language development to increase a student's proficiency in the English language. This is sometimes referred to as "English as a Second Language" or "ESL". During ESL, students are

taught how to speak, read, write and generally function in the English language. ESL is most effective when it is tailored to the specific proficiency level of a given ELL student. ADE recognizes five different proficiency levels. Ideally, ELL programs should provide separate ESL services to students in each of the different proficiency levels.

The second component of ELL instruction involves providing ELL students with instruction in academic content areas such as math, social studies, science and history. Ensuring that ELL students have access to the academic curriculum, as well as language development, is necessary to fulfill the EEOA. *Flores I*, 172 F.Supp.2d 1225. Because Proposition 203 requires all instruction to be in English, school districts must ensure that a student who has little if any English-language skills can learn, for example, science in an English-only science class or history in an English-only history class. As the Court might imagine, teaching the scientific method or the American Revolution in English to a student who speaks little or no English is an enormous challenge. For this reason, academic content classes containing ELL students must be taught using a specific instructional method referred to as "Sheltered English Immersion" or "SEI". Teachers must be specifically trained in SEI so that they can effectively communicate the day's lessons to children who to some degree do not speak the same language as the teacher.

SEI classes are costly. SEI teachers must be highly qualified in the content areas they teach *and*

must be certified in SEI. SEI teachers also require ongoing training in SEI methods. For SEI classrooms to be effective, they should contain fewer students than mainstream classes because SEI teachers must be able to provide ELL students with an adequate degree of individualized attention. Making sure that qualified SEI teachers are present in properly sized SEI classes is crucial because, as a result of Arizona's English immersion law, SEI instruction is the primary assistance an ELL student receives when he or she is placed in an English-only classroom and expected to learn academic content.

A successful ELL program needs to include both ESL and SEI instruction during the school day. Recently, the State of Arizona Department of Education has adopted an ELL instructional model requiring school districts to provide ELL students with four hours of intense ELL instruction per day in a segregated classroom with a relatively low student/teacher ratio. ELL students must also separately receive academic content in SEI classrooms. Both aspects of this program are expensive.

It is imperative that school districts have highly trained SEI teachers. ADE's SEI certification program, which requires teachers to take a mere four credit hours of instruction, is just the first step toward providing the kind of training required to teach teachers how to provide academic content instruction to students who are not yet proficient in English. For this reason, TUSD, SUSD and MUSD employ "coaches" or "demonstration teachers" who provide

ongoing training to teachers in SEI methodology. These coaches also spend time modeling successful teaching techniques for SEI teachers, observing SEI teachers, and providing feedback to SEI teachers so that they can become more effective in teaching ELL students. Despite their best efforts, *Amici* school districts struggle to find funds to adequately train SEI teachers. They also lack funds to hire highly qualified SEI teachers who have both SEI and ESL endorsements. As the Ninth Circuit pointed out, one of the Petitioners' own experts testified that a 15:1 student/teacher ratio would significantly enhance English learning success. NUSD's Superintendent, however, testified that NUSD could not recruit sufficient teachers to achieve this ratio due to resource constraints. *Flores III*, 516 F.3d at 1157.

The challenges school districts face in educating elementary grade level ELL students only increase at the middle and high school levels. Districts must hire teachers who are highly qualified as defined by NCLB and who also have appropriate content area and SEI certification. Optimally, these teachers should also be ESL certified; less optimally, they should be at least ESL proficient. Instructing middle and high school ELL students is also difficult due to the fact that students have fewer years to master both English and required substantive content areas. Beginning in the 2005-2006 school year, Arizona made passing the AIMS test a requirement for high school graduation. The AIMS test is given in English.

At the evidentiary hearing in January of 2007, one of Petitioners' own witnesses testified that AIMS scores of NUSD high school ELL students are unacceptably low. Testimony at the hearing showed that even though some NUSD elementary schools have relatively high ELL AIMS scores, NUSD high school AIMS scores are among the lowest in the State. *Flores III*, 516 F.3d at 1158-59. *Amici* and other school districts with large ELL student populations struggle to achieve acceptable AIMS scores. Low AIMS scores for ELL seniors have a particularly devastating effect as many of these students will become discouraged by their inability to graduate and drop out of school.

In addition to receiving adequate ESL and SEI instruction, ELL student success is also contingent on the degree of extra assistance an ELL student receives by way of before- and after-school tutoring programs, the amount of support and translation services offered to ELL parents so that they can be a constructive part of their child's education, and the extent of assessment and tracking a school is able to undertake. ADE requires school districts to test ELL students' English proficiency at least once per year and to submit the test result data to ADE. Neither the State nor ADE provides school districts with additional funding to perform these tasks. School districts also do not receive additional funding to perform ongoing tracking and assessment of ELL achievement. These efforts are important because they assist districts in measuring their ELL students'

proficiency levels in order to determine what type of additional ELL instruction should be provided to such students. Reviewing test data and creating instructional plans based on this data is a time-intensive task that often requires schools to hire one or more full-time employees. For example, TUSD spent approximately $273,400 and SUSD spent approximately $73,460 on ELL assessment personnel and materials during the 2005-2006 school year. A witness for Petitioners admitted that the gains achieved by NUSD's ELL students in recent years were due, in part, to NUSD's use of assessment tools. In the 2005-2006 school year, NUSD spent approximately $92,250 on compiling, tracking and analyzing ELL performance data.

Providing adequate ELL instruction and programs is a complicated and multi-faceted endeavor. School districts are already stretched to their limits in terms of finances, personnel and morale. They will continue to struggle to provide general education and ELL programs in compliance with the EEOA in the absence of minimally adequate assistance and resources from the State.

B. Arizona school districts require more ELL education resources than the State is currently providing.

The January 2007 hearing demonstrated that the per pupil cost of ELL instruction during the 2005-2006 school year was $1,570 at NUSD, $2,749 at

TUSD, and $3,300 at Glendale Union High School District ("GUHSD").[1] A cost study performed by ADE almost twenty years ago showed that the per pupil ELL instruction cost in 1988-1989 was approximately $450 per student per year. *Flores I*, 172 F.Supp.2d at 1238-39. The national experts hired by the State offered the opinion that ELL instruction costs between $1,026 to $2,571 per pupil and experts from the State of Arizona hired by the State estimated the cost to be $1,447 to $1,785 per student. Petitioners' Appendix at 19a. And yet, as of the 2005-2006 school year, the State provided only $365 per pupil for ELL instruction. HB 2064 would increase that amount to $444 (almost the amount required twenty years ago), but even witnesses for the Petitioners could not establish what data supported the State's per pupil funding. *Flores III*, 516 F.3d at 1155.

---

[1] During the evidentiary hearing, Petitioners' own witness held GUHSD out as an example of a school district that had made exemplary strides in educating its ELL students. Among the programs at GUHSD that have made that district's ELL programs so successful are small first-year ELL classes, intensive teacher training, one-on-one tutoring from a teacher and an English-proficient student, language acquisition computer programs, teacher mentors, a summer language learner course, social workers, and interpreting services for parents. GUHSD's success involves the expenditure of approximately $3,300 per ELL student.

C. Arizona school districts should not be forced to rob from limited general education funds in order to provide adequate ELL instruction.

Petitioners argue that school districts can always use general maintenance and operation ("M&O") monies to fund their ELL programs and that school districts are not limited to the additional $365 per ELL pupil (or under HB 2064, $444 per ELL pupil) that the legislature provides to school districts based on their ELL counts. The EEOA's requirement that the State provide adequate resources to implement its chosen ELL programs would be meaningless, however, if the State could fulfill the "resource" requirement simply by pointing to all funding that school districts receive. This is especially true if the record is void, as it is here, of any proof that the funding allotted to Arizona schools for general education is at least minimally adequate to provide ELL students with both a basic general education and adequate ELL instruction.

Petitioners' arguments about the use of M&O funds is flawed because Arizona school districts with large ELL student populations cannot divert general education funding to ELL programs without seriously impacting their ability to provide basic educational opportunities. Contrary to the picture painted by Petitioners, Arizona public school districts are not awash in M&O funding. Rather, they are subject to strict, legally imposed budget limits that make Arizona one of the lowest ranking states when it comes

to financing education. *See* A.R.S. § 15-905. A 2007 U.S. Department of Education report on expenditures for public elementary and secondary education ranked Arizona number 50 out of 51 states, including the District of Columbia, in the amount of funding it provides for education based on nationwide comparisons of per pupil expenditures. http://nces.ed.gov/pub search. School districts must use every penny of the scarce M&O funding they receive in order to provide basic education services to their students. Diverting meager M&O funding to ELL instruction would put many if not most school districts with large ELL populations at risk of being unable to comply with State and federal No Child Left Behind achievement requirements. Arizona school districts with large numbers of ELL students thus face a Hobson's choice of starving their ELL programs or starving their general educational programs. For districts with large ELL populations, both of these choices adversely impact large numbers of ELL students, the vast majority of whom are minority students. The most severe impact occurs in school districts with high minority populations.[2] The resulting effect is discrimination prohibited by the EEOA.

Although Petitioners point to the success NUSD has had in educating some of its elementary school

---

[2] SUSD provides a good example of this impact. Over 90% of SUSD students are minority students; over 80% qualify economically for free or reduced price lunches; over 30% are ELL students.

ELLs, their facts and statistics do not tell the whole story. The evidence at the hearing was that NUSD achieved its ELL gains by spending $1,570 per student, which is substantially more than the base level funding normally provided by the State. *Flores II*, 480 F.Supp.2d at 1160. Petitioners' briefs tout the success of NUSD ELLs (while choosing not to focus on the low scores of ELL high school students), but avoid talking about the bigger picture. According to ADE's website, NUSD as a whole failed to make Adequate Yearly Progress in 2006, 2007 and 2008. http://www10.ade.az.gov/ReportCard/DistrictDetails.aspx?id=4457&ReportLevel=2. ADE's website also lists the improvement status of NUSD's schools. One of NUSD's elementary schools has a restructuring planned and another has a warning. The District's vocational high school has a corrective action plan in place, and the District's primary high school has a warning.

NUSD's limited success in teaching ELLs English appears to have come at the cost of providing a general education to all of its students, including its many ELL students. The District Court correctly determined that this was not an acceptable state of affairs from an EEOA perspective.

Amici are not arguing that the State is legally obligated to "throw money" at them for the benefit of their respective ELL or general education programs. All *Amici* request is a level playing field so that the vast majority of ELL students are offered equal educational opportunities as compared to students in districts that have relatively low ELL student populations. This type

of discriminatory impact is addressed by the EEOA and the leading case interpreting it, *Castenada*. In *Castenada*, the Fifth Circuit held that the educational agency must not just implement an educational theory to instruct ELLs, it must "follow through with practices, resources and personnel necessary to transform theory into reality." *Castenada*, 648 F.2d at 1008, 1010. The evidence reviewed by the District Court and the Ninth Circuit clearly demonstrates that, while the State has selected a theory to instruct ELL students, it has not followed through with the resources necessary to transform that theory into reality. ("HB 2064 . . . does not provide funding for ELL instruction, for all ELL students, that is rationally related to the cost of that instruction." *Flores II*, 480 F.Supp.2d at 1166.) The EEOA prohibits states from denying equal educational opportunities to students by "the failure by an educational agency to take appropriate action to overcome language barriers that impeded equal participation by its students in its instructional programs." 20 U.S.C. § 1703(f). As the Ninth Circuit correctly stated, "Diverting base level funds – thereby hurting all students in an attempt to equalize opportunities for ELL students – is not an 'appropriate' step." *Flores III*, 516 F.3d at 1171.

Lest there be any doubt that there is something discriminatory and deeply wrong with the State's suggestion that school districts should just use regular M&O funds to cover the cost of ELL instruction, an analogy may be helpful. If a school district were

shown to have discriminated against African-American students for years by providing library facilities and materials at predominately African-American schools that were far inferior to the library facilities and materials at predominately Anglo schools, there would be no doubt but that such discrimination would be required to be remedied. It would be wholly inappropriate, however, for the school district to "remedy" this situation by expecting the predominately African-American schools to divert substantial M&O funds to improve their substandard library facilities and materials. Such a "remedy" might result in better library facilities and materials, but would do so at the expense of equal educational opportunities for the minority students who were the victims of the discrimination in the first place. Petitioners' approach to the Court's finding that Arizona violated the EEOA, however, is analogous to this situation. Petitioners in essence argue that high ELL population schools are obligated to divert substantial M&O funds from other educational needs in order to fund ELL instruction. This obligation cannot be considered "appropriate action" under the EEOA.

In their zeal to argue that general funding is adequate for schools to educate ELLs without significant additional resources, Petitioners point out that Group B funds are discretionary and can be used for any purpose. Petitioners then argue as follows: "Because group B funds are provided based on the number of students participating in ELL programs, a dramatic increase in group B funds could create

perverse incentives for schools to keep ELL students languishing in special-language programs." Petitioners' Brief at p. 64. Not only is this purely speculative possibility insulting to *Amici* and all Arizona school districts that try to educate students to the best of their abilities, it also ignores the accountability provisions of NCLB upon which Petitioners elsewhere rely so heavily.

IV. Neither General Funding Increases Nor HB 2064 Provide Adequate Resources for ELL Instruction.

A. General funding increases do not solve the problem of providing equal educational opportunities to all students.

Petitioners point to increases in M&O monies since 2000 to argue changed circumstances. The funding increases touted by Petitioners, however, have for the most part been necessary to keep pace with inflation and have not substantially increased the real spending power of Arizona's public school districts. If the increases in M&O funding over the past seven years created the type of surplus that would allow school districts to adequately fund their ELL programs with such funds, Arizona would not rank so low nationally in the amount of education dollars it provides per student. Petitioners also point to increases in federal funding to argue changed circumstances. Once again, many of these increases are tied to inflation and do not provide districts with leftover monies. Moreover, school districts cannot use

these federal monies to satisfy the State's obligation to provide adequate resources to implement its required ELL programs.

B. HB 2064 continues to fund ELL programs arbitrarily and capriciously.

HB 2064 provides school districts only $444 per pupil for ELL instruction. As discussed above, testimony at the hearing showed that school districts' ELL program costs ranged between $1,500 and $3,300 per student during the 2005-2006 school year, or four to nine times more than the funds provided by HB 2064 during the first two years of ELL instruction.

Contrary to Petitioners' repeated misleading assertions that districts may apply for additional funding under HB 2064 if $444 is not enough, many school districts, including *Amici* districts, are not entitled to receive much if any additional ELL instruction funding based on the funding scheme set forth in HB 2064. This is because HB 2064 unlawfully requires a school district to make offsets in monies it could otherwise request based on defined percentages of its Title I, IIA, III and Federal Impact aid monies and any desegregation monies it receives pursuant to A.R.S. § 15-910.

HB 2064's inadequate approach to providing resources for ELL programs is exacerbated by the law's two-year cut-off, which abruptly takes away the $444 per pupil once an ELL student has been classified as an ELL for two years irrespective of whether

that student has reached English proficiency. Petitioners euphemistically refer to the cut off as an "incentive," but that is not the way it reads in HB 2064: "funding for the same ELL pupil shall not be provided for more than two fiscal years." This two-year cutoff is arbitrary and capricious because many if not most ELL students do not reach proficiency within two years.

Both the Petitioners' witnesses and representatives from Arizona school districts testified that many ELL students fail to reach proficiency in two years. Petitioners' expert witness stated that "some children will certainly require more time" than two years to become proficient in English. *Flores II*, 480 F.Supp. at 1164. Petitioners' witness Kelt Cooper stated that he thought that "a bright young person with a great deal of support could probably be pretty good at a second language" within three years. *Id.* Looking to actual ELL data, witnesses from Arizona school districts all testified that it takes their ELL students more than two years to become proficient. In TUSD, students take an average of 4.6 years to become proficient. In NUSD, the number is between 4-5 years. In the Murphy Elementary School District, 86% of ELL students took longer than two years to achieve proficiency and in GUHSD, one of the most successful districts with respect to ELL test scores, at one high school 46% of students did not reach proficiency within two years and at another high school 15% of ELL students did not reach proficiency within two years. *Id.* at 1163-64. All *Amici* concur that large

numbers of their ELL students are not English proficient within two years. Based on these undisputed facts, the Ninth Circuit correctly found that:

> There is absolutely no evidence in the record to support the proposition that a student's need for ELL programs invariably vanishes after two years of instruction: Instead the evidence is squarely to the contrary, as all witnesses testified that some students would certainly take longer than two years to become proficient in English.

Flores III, 516 F.3d at 1177. As the District Court pointed out, in NUSD the two year cut-off would effectively reduce the district's Group B weight funds from $365 to $182/student when funding for non-English proficient ELLs is cut off after two years. *Flores II*, 480 F.Supp. at 1163.

CONCLUSION

Amici have a legal and moral obligation to provide a sound education to Arizona's ELL students. *Amici*, however, have struggled for years under a system of ELL funding that consistently and drastically fails to fund ELL programs in a manner that rationally relates to what their ELL programs actually cost. If the Ninth Circuit's ruling is not affirmed, *Amici* will be significantly impaired in their ability to provide ELL students with the education the law requires and that is necessary for ELL students to become productive members of society.

Because the District Court's March 2007 Order was appropriate and there is no basis for overturning it, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

JOHN C. RICHARDSON
DECONCINI MCDONALD YETWIN & LACY, P.C.
2525 East Broadway Boulevard, Suite 200
Tucson, Arizona 85716
Telephone: (520) 322-5000
Facsimile: (520) 322-5585

March 25, 2009

AMICUS CURIAE BRIEF

Nos. 08-289 & 08-294

IN THE

Supreme Court of the United States

THOMAS C. HORNE, Superintendent of Public Instruction of the State of Arizona,

Petitioner,

-and-

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES AND PRESIDENT OF THE ARIZONA SENATE,

Petitioners,

v.

MIRIAM FLORES, individually and as parent of MIRIAM FLORES, minor child; ROSA RZESLAWSKI, Individually and as parent of MARIO RZESLAWSKI, minor child; STATE OF ARIZONA; and MEMBERS OF THE ARIZONA STATE BOARD OF EDUCATION IN THEIR OFFICIAL CAPACITIES,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* WASHINGTON LAWYER'S COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS IMMIGRANT AND REFUGEE RIGHTS PROJECT, DC LANGUAGE ACCESS COALITION, AND LATIN AMERICAN YOUTH CENTER, IN SUPPORT OF RESPONDENTS MIRIAM FLORES AND ROSA RZESLAWSKI

PATRICK F. LINEHAN
Counsel of Record
JAMES L. STUART
ANGELA L. LIPSCOMB
ANTHONY J. RAPA
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000

Attorneys for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 6

I. States Must Have the Option of Bilingual Education to Address the Challenges of ELLs 6

A. The Language Gap Creates Unequal Access to Other Subjects 6

B. Bilingual Education Can Help ELL Students Overcome the Language Gap 8

II. Congress Intended Section 1703(f) to Confer a Right of "Equal Educational Opportunity" to Non-English-Speaking Students, and to Leave Significant Flexibility to Local Educational Agencies in Implementing that Right, Including Bilingual Education Where Appropriate 11

Contents

Page

A. The History and Context of Section 1703(f) Demonstrate Congress' Intent to Create a Statutory Right to Remedy Language-Based Educational Inequity 11

B. The Flexible "Appropriate Action" Standard in Section 1703(f) Confers on State and Local Educational Agencies the Discretion to Effectuate This Right Through Bilingual Education Where Appropriate 16

III. Title III Was Never Intended to Alter Either the Right Created or the Federalism Balance Struck by Section 1703(f) 20

A. Title III Cannot Alter the Statutory Right Created by Section 1703(f) Absent Clear Congressional Intent .. 20

B. Title III Does Not Evidence Clear Congressional Intent to Disrupt Section 1703(f)'s Balance of Federalism Considerations 22

CONCLUSION 26

TABLE OF CITED AUTHORITIES

Page

Cases

ACORN v. *NYC Dep't of Educ.*,
269 F. Supp. 2d 338 (S.D.N.Y. 2003) 22

BFP v. *Resolution Trust Corp.*,
511 U.S. 531 (1994) 23

Brown v. *Bd. of Educ. of Topeka*,
347 U.S. 483 (1954) 23-24

Castañeda v. *Pickard*,
648 F.2d 989 (5th Cir. 1981) ..... *passim*

Cintron v. *Brentwood Union Free Sch. Dist.*,
455 F. Supp. 57 (E.D.N.Y. 1978) 15

Coachella Valley Unified Sch. Dist. v. *California*,
C 05-02657 WHA, 2005 WL 186499
(N.D. Cal. Aug 5, 2005) 22

Epperson v. *Arkansas*,
393 U.S. 97 (1968) 23

Flores v. *Arizona*,
516 F.3d 1140 (9th Cir. 2008) 11, 25

Fresh Start Acad. v. *Toledo Bd. of Educ.*,
363 F. Supp. 2d 910 (N.D. Ohio 2005) 22

Cited Authorities

Page

Graham v. *Richardson*,
403 U.S. 365 (1971) 12

Gregory v. *Ashcroft*,
501 U.S. 452 (1991) 23

K.F. v. *U.S. Dep't of Educ.*,
05-11764-RWZ, 2006 WL 1892242
(D. Mass. July 10, 2006) 22

Lau v. *Nichols*,
414 U.S. 563 (1974) 12, 14, 15

Morton v. *Mancari*,
417 U.S. 535 (1974) 20

Nachman Corp. v. *PBGC*,
446 U.S. 359 (1980) 12

Owasso Indep. Sch. Dist. No. I-011 v. *Falvo*,
534 U.S. 426 (2002) 24

Pa. Dep't of Corr. v. *Yeskey*,
524 U.S. 206 (1998) 23

San Antonio Indep. Sch. Dist. v. *Rodriguez*,
411 U.S. 1 (1973) 23

South Dakota v. *Dole*,
483 U.S. 203 (1987) 25

Cited Authorities

Page

United States v. *Lopez*,
514 U.S. 549 (1995) 23

Will v. *Mich. Dep't of State Police*,
491 U.S. 58 (1989) 22-23

Wisconsin v. *Yoder*,
406 U.S. 205 (1972) 23

Statutes

20 U.S.C. § 1706 (2006) 4

20 U.S.C. §§ 6801-7013 (2006) 5

20 U.S.C. § 6812(9) 24

20 U.S.C. §§ 6821-6826 ..... 21, 25

20 U.S.C. § 6823(c) 25

20 U.S.C. § 6842 ..... 21, 25

20 U.S.C. § 6842(a)(1) 24-25

20 U.S.C. § 6842(a)(3)(A) 21

20 U.S.C. § 6842(a)(3)(A)(i) 25

20 U.S.C. § 6842(b)(4) 25

20 U.S.C. § 6847 21

Cited Authorities

Page

Bilingual Education Act of 1974,
Pub. L. No. 93-380, 88 Stat. 503 (1974) 18

D.C. Language Access Act of 2004,
D.C. Code §§ 2-1931-1937 (2004) 3

Equal Educational Opportunity Act of 1974,
20 U.S.C. § 1703(f) (2006) ..... *passim*

Legislative Materials

118 CONG. REC. 8928 (1972) 13

120 CONG. REC. 15,430 (1974) 15

Annals of Cong. 388 (1849) 16

Equal Educational Opportunities Act: Hearings on H.R. 13915 Before the H. Comm. on Education and Labor, 92d Cong. 140-41 (1972) 13, 19

H.R. REP. NO. 92-1335 (1972) 14

Cited Authorities

Page

Books and Articles

H.D. ADAMSON, LANGUAGE MINORITY STUDENTS IN AMERICAN SCHOOLS: AN EDUCATION IN ENGLISH (2005) 9

J. David Ramirez et al., *Executive Summary of the Final Report: Longitudinal Study of Structured English Immersion Strategy, Early-Exit and Late-Exit Transitional Bilingual Education Programs for Language-Minority Children*, 16 BILINGUAL RES. J. 1 (1992) 10

NATIONAL LITERACY PANEL ON LANGUAGE-MINORITY CHILDREN AND YOUTH, DEVELOPING LITERACY IN SECOND LANGUAGE LEARNERS (Diane August & Timothy Shanahan eds., 2006) 8-9

Robert E. Slavin & Alan Cheung, *A Synthesis of Research on Language of Reading Instruction for English Language Learners* (2005), 75 REV. OF EDUC. RES. 247 (2005) 9

Cited Authorities

Page

Stephen Krashen & Grace McField, *What Works? Reviewing the Latest Evidence on Bilingual Education* (2005), LANGUAGE LEARNER, Nov./Dec. 2005 9

WAYNE THOMAS & VIRGINIA COLLIER, A NATIONAL STUDY OF SCHOOL EFFECTIVENESS FOR LANGUAGE MINORITY STUDENTS' LONG TERM ACADEMIC ACHIEVEMENT (2002) 9, 10

Other Materials

Address to the Nation on Equal Educational Opportunities, 1972 PUB. PAPERS 426 (March 16, 1972) 12

INTEREST OF THE *AMICI CURIAE*[1]

English-Language Learner ("ELL") and English-speaking students have different educational experiences. ELL students face an additional high barrier—the hurdle of working in a new language—in their efforts to gain access to the same academic curriculum as their English-speaking peers. While this barrier is often addressed inadequately by State and local educational agencies, it is most likely to be surmounted if these agencies have the freedom to employ a range of educational methods, including bilingual instruction.

Amici appear in this Court to urge a resolution that does not prevent or discourage such instruction. *Amici* are non-profit organizations familiar with the academic obstacles facing ELL students. *Amici* have served as advocates for the civil and educational rights of children and adults struggling to overcome a lack of proficiency in the English language. *Amici* share an interest in ensuring that States continue to have all the tools necessary to provide ELL students with educational opportunities equal to their non-ELL peers.

---

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

Washington Lawyers Committee on Civil Rights and Urban Affairs – Immigrant and Refugee Rights (IRR) Project, established in 1978, seeks to enforce the rights of immigrants, many of whom cannot access the U.S. legal system on their own due to language barriers. In its long history, the IRR Project has advocated on behalf of hundreds of immigrants who were victims of discrimination in housing and employment matters or who were denied access to government services.

The **D.C. Latin American Youth Center**, founded in the late 1960s and incorporated as a nonprofit organization in 1974, serves multicultural youth, many of whom do not have English proficiency, with a comprehensive set of social services and educational, work skills, advocacy programs and residential programs.

The **D.C. Language Access Coalition** is an alliance of 25 community-based and civil rights organizations[2]

---

[2] The Coalition's member organizations include: Africa Resource Center, American University Washington College of Law—International Human Rights Law Clinic, Asian American Justice Center, Asian American LEAD, Asian Pacific American Legal Resource Center, Asian Service Center, Ayuda, CARECEN, CentroNia, Columbia Heights Shaw Family Support Collaborative, District of Columbia Area Health Education Center, DC Learns, Ethiopian Community Center, La Clinica del Pueblo, Latin American Economic Development Corporation, Latin American Youth Center, Latino Federation of Greater Washington, Life Skills Center, Mary's Center for Maternal and Child Care, Multicultural Community Service, Neighbors Consejo, Newcomer Community Service Center, Vietnamese American Community Service Center, Washington Lawyers' Committee for Civil Rights and Urban Affairs, and WEAVE, Inc.

that advocate for language access rights in the District of Columbia. The central purpose of the Coalition is to ensure that all persons in the District of Columbia with limited English proficiency or no English proficiency have equal access to government services, programs, and activities. The Coalition played a key role in the passage of the D.C. Language Access Act of 2004, D.C. Code §§ 2-1931-1937 (2004) and is named in the Act as a non-partisan, consultative organization that collaborates with the D.C. Office of Human Rights to monitor government agencies' compliance with the Act.

Amici believe that the Equal Educational Opportunity Act of 1974 ("EEOA") gives ELL students individual rights to equal educational opportunity and gives local educational authorities the discretion to use bilingual education to protect those rights. *Amici* are concerned that the standards for language acquisition set forth in the No Child Left Behind Act ("NCLB") will not simply be used as criteria for federal funding, but will be used to redefine the right to equal opportunity in education and to restrict the availability of bilingual education. Based on their collective experience with language barriers, *Amici* believe that such an interpretation would disadvantage both ELL students and their teachers. This amicus brief shows that Congress never intended that result.

SUMMARY OF THE ARGUMENT

ELLs in American public schools often lag behind their English-speaking peers in meaningful access to the same academic curriculum. If left unremediated, this gap in learning can condemn ELL students to a life of limited opportunities and poverty. One well-recognized means of addressing this issue is bilingual education, where ELL students receive some percentage of their overall educational instruction in their native language. Through this approach, ELL students are often able to close the gap and meet the same rigorous academic standards as their English-speaking peers.

Congress had precisely this language gap, and the benefits of bilingual education, in mind when it enacted Section 1703(f) of the EEOA ("Section 1703(f)") in 1974, vesting in "individuals" the right to "equal educational opportunity," and likewise vesting in the States flexibility in achieving this goal through "appropriate action." 20 U.S.C. § 1703(f) ("No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex or national origin by . . . (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."). Moreover, lest there be any doubt as to the nature of this right, Congress concomitantly included within the EEOA a private right of action for individuals seeking to remedy violations of the right to equal educational opportunity. 20 U.S.C. § 1706 (2006). Ample case law—particularly *Castañeda* and its progeny—has recognized both the individual right guaranteed in Section 1703(f), and the flexibility of the States in taking

appropriate action to remedy violations of the same, including the adoption of long-term bilingual education programs.

Subsequently, in 2002, almost 30 years after Section 1703(f)'s enactment and almost 20 years after the Fifth Circuit's landmark decision in *Castañeda*, Congress passed Title III of NCLB ("Title III"). 20 U.S.C. §§ 6801-7013 (2006). Title III requires participating States to set and meet annual performance objectives for English acquisition by ELL students. It is designed to create a system of accountability for receipt of federal funds, is voluntary in nature, and contains no private right of action. Most significantly, its overwhelming emphasis on achieving short-term progress on English acquisition has the effect of requiring States to focus their Title III dollars on English acquisition strategies, and not on bilingual education strategies, which often aim for English-language acquisition in the long term while providing native-language instruction in subjects like science and mathematics.

Despite the substantially different purposes of these laws, Petitioners advance the position that States' compliance with Title III necessarily satisfies the mandate to ensure ELL students' right to equal educational opportunity under Section 1703(f). Taking Petitioners' view, Title III would effectively eviscerate Section 1703(f)'s flexible approach toward "appropriate action." It would hinder the States' ability to adopt bilingual education as a long-term strategy toward providing equal educational opportunity to ELL students. If Title III—with its standards effectively discouraging bilingual education—were considered the

new standard of "appropriate action" under Section 1703(f), it would materially alter the right Congress created in 1974. It would also significantly curtail the ability of the States to choose from a wide range of remedial programs to remove language barriers. Absent a clear congressional statement, this Court should not allow a subsequent funding law to modify the right to equal educational opportunity set forth in Section 1703(f) and the delicate federalism balance struck by Congress therein.

ARGUMENT

I. States Must Have the Option of Bilingual Education to Address the Challenges of ELLs

A. The Language Gap Creates Unequal Access to Other Subjects

Teaching English to ELL students is not enough. They must at the same time master other subjects. Yet their difficulties with English create unequal access to educational opportunity, or a "language gap," that manifests itself in significant academic underperformance of ELL students when compared to their English-speaking peers. According to nationwide historical data from the National Assessment of Educational Progress (NAEP),[3] ELL students lag far behind their English-speaking peers in mathematics, science, and other non-language subject areas.

[3] NAEP is a nationwide educational assessment conducted by the U.S. Department of Education National Center for Education Statistics. *See* http://nces.ed.gov/nationsreportcard/nde/criteria.asp (last visited Mar. 19, 2009).

Moreover, the achievement gap has persisted for over a decade. For example, in 2007, ELL fourth graders lagged 25 points behind non-ELLs on mathematics achievements tests, virtually unchanged from a 24-point gap in 1996. *See* Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., National Assessment of Educational Progress, http://nces.ed.gov/nationsreportcard/nde/criteria.asp (last visited Mar. 19, 2009).[4] The gap widens to 37 points for eighth graders, a modest improvement over a 46-point gap in 1996. *Id.*[5] To put these figures in perspective, 44% of ELL fourth graders were considered "below basic" in mathematics in 2007, as compared with 15% of non-ELL students. *Id.*

The disparities are no less grave in other subjects. In 2005, fourth-grade ELL students trailed their non-ELL counterparts by 32 points in science; 72% of fourth-grade ELLs were "below basic" in science, as compared to 29% of non-ELLs. *Id.*[6] The science gap grows to 44 points for eighth graders and 41 points for twelfth graders, with a staggering 86% and 88% of ELLs,

---

[4] Information is retrieved from the NAEP by accessing the NAEP website and selecting certain criteria from which results will be generated. *See* http://nces.ed.gov/nationsreportcard/nde/criteria.asp (last visited Mar. 19, 2009). For example, the NAEP website generated the comparison of fourth grade ELL and non-ELL math students based upon the selection of the following criteria from a series of drop-down boxes: (1) Grade 4; (2) mathematics; (3) national results; (4) student is an English language learner; (5) years 1996, 2000, 2003, 2005, and 2007.

[5] The mathematics test results are based on a 500-point scale.

[6] The science test results are based on a 300-point scale.

respectively, considered "below basic" in those groups. *Id.* The numbers for civics are similar, reflecting 2006 achievement gaps of 38, 46, and 42 points across the fourth, eighth, and twelfth grades. *Id.*[7] Eighty-two percent of twelfth-grade ELL students, a large portion of whom reached voting age in 2006, were considered "below basic" in civics that year. *Id.*

B. Bilingual Education Can Help ELL Students Overcome the Language Gap

Despite these daunting figures, one proven means of reducing the language gap is to make some use of the ELL students' native language during the course of their educational instruction. Numerous studies demonstrate that bilingual education could be an effective alternative in helping ELL students overcome educational obstacles posed by their lack of English proficiency, and that it may in fact be superior to other methods.

For example, in a meta-analytical study examining the results of several studies comparing bilingual education to English-only programs, the National Literacy Panel on Language-Minority Children and Youth concluded that there was no indication that bilingual education impedes academic achievement, and that any observed differences between bilingual and immersion programs favor bilingual instruction. *See* NATIONAL LITERACY PANEL ON LANGUAGE-MINORITY CHILDREN AND YOUTH, DEVELOPING LITERACY IN SECOND LANGUAGE LEARNERS 397-98 (Diane August & Timothy

---

[7] The civics test results are based on a 300-point scale.

Shanahan eds., 2006). Another study, reviewing several meta-analytical studies, concluded that bilingual education students consistently outperformed immersion students. *See* Stephen Krashen & Grace McField, *What Works? Reviewing the Latest Evidence on Bilingual Education*, LANGUAGE LEARNER, Nov./Dec. 2005, at 7-8. Yet another recent study concluded that bilingual programs raise students' achievement levels, and that parents refusing to enroll their ELL children in such programs should be cautioned that their children's achievement will likely be much lower as a result. *See* WAYNE THOMAS & VIRGINIA COLLIER, A NATIONAL STUDY OF SCHOOL EFFECTIVENESS FOR LANGUAGE MINORITY STUDENTS' LONG TERM ACADEMIC ACHIEVEMENT 333 (2002); *see also* H.D. ADAMSON, LANGUAGE MINORITY STUDENTS IN AMERICAN SCHOOLS: AN EDUCATION IN ENGLISH 231-32 (2005) (citing research showing that well-run bilingual programs are effective, but that not all bilingual programs are well-run); Robert E. Slavin & Alan Cheung, *A Synthesis of Research on Language of Reading Instruction for English Language Learners*, 75 REV. OF EDUC. RES. 247, 273 (2005) (reviewing 17 studies of various language programs, 12 of which found positive effects of bilingual education and none of which found results favoring English immersion).

Moreover, there is also evidence that bilingual education is particularly effective if it is implemented as a long-term strategy. For example, researchers Thomas and Collier conclude that "bilingually schooled students outperform comparable monolingually schooled students in academic achievement in all subjects, after 4-7 years of dual language schooling." *See* THOMAS & COLLIER, *supra*, at 334. When bilingually educated ELL

children initially exit into the English mainstream, English-only children outperform them in English, but the bilingually educated students typically close this gap by the middle-school years and surpass their English-only peers during high school. *Id.*; *see also* J. David Ramirez et al., *Executive Summary of the Final Report: Longitudinal Study of Structured English Immersion Strategy, Early-Exit and Late-Exit Transitional Bilingual Education Programs for Language-Minority Children*, 16 BILINGUAL RES. J. 1-2 (1992) (eight-year study concluding that students who received long-term native language instruction with increasing amounts of English tend to approach grade level norms faster than students who received short-term native language instruction or had been immersed in English with little or no native language support).

In light of this evidence and their collective experience with language barriers, *Amici* believe that bilingual education should remain an option for state and local school systems seeking to meet the challenge of teaching ELL students. As shown more fully below, Congress has provided both a right to equal educational opportunity for these students and sufficient flexibility for their school systems to employ bilingual education to satisfy that right.

II. Congress Intended Section 1703(f) to Confer a Right of "Equal Educational Opportunity" to Non-English-Speaking Students, and to Leave Significant Flexibility to Local Educational Agencies in Implementing That Right, Including Bilingual Education Where Appropriate

Congress intended to build two concepts into Section 1703(f): (1) the creation of an individual right to equal educational opportunity for ELL students; and (2) the preservation of significant flexibility at the State and local level to craft the "appropriate action" to ensure that right. The history and context of this statute confirm these points.

A. The History and Context of Section 1703(f) Demonstrate Congress' Intent to Create a Statutory Right to Remedy Language-Based Educational Inequity

At the outset, the text of Section 1703(f) supports the Ninth Circuit's view that "[t]he EEOA's concern . . . lie fundamentally with the current rights of individual students." *Flores* v. *Arizona*, 516 F.3d 1140, 1173 (9th Cir. 2008). This is a point that Respondent argues persuasively (*see* Respondent Br. at 22-27) and needs no elaboration here. In addition to the text, however, *Amici* submit that the legislative history and context of this provision's enactment confirm its role in creating an individual right, as distinct from the systemwide assessments at issue in Title III of the NCLB.

The process that led to the enactment of Section 1703(f) occurred in two steps. Initially, President Nixon

proposed a nearly identically-worded provision as part of the Equal Educational Opportunities Act of 1972. The language was not enacted at that time. However, four months after this Court's decision in *Lau* v. *Nichols*, 414 U.S. 563 (1974), which suggested some ambivalence as to whether ELL students have a right to a meaningful opportunity to participate in educational programs, Congress enacted the proposed language without debate. Both steps help illuminate the meaning of the statute. *See, e.g., Nachman Corp.* v. *PBGC*, 446 U.S. 359, 376-78 (1980) (interpreting statute in light of legislative history of previously considered but ultimately unenacted version of bill containing similar language); *Graham* v. *Richardson*, 403 U.S. 365, 381-82 (1971) (looking to the legislative history of an identical statute for any clear indication of congressional intent when the legislative history of the statute being discussed was unavailable).

In introducing the Equal Educational Opportunities Act of 1972, President Nixon sought to improve America's public education system by creating for each student a right to equal educational opportunity, regardless of race, color or ethnic origin. On March 16, 1972, the President addressed the country to discuss his commitment to the creation of a right of equal educational opportunity, explaining that the bill "would further establish *an educational bill of rights* for Mexican-Americans, Puerto Ricans, Indians, and others who start their education under language handicaps, to make certain that they, too, will have equal opportunity." Address to the Nation on Equal Educational Opportunities, 1972 PUB. PAPERS 426 (March 16, 1972) (emphasis added).

The following day, President Nixon made a special address to Congress to outline the purpose of the proposed Act, and spoke in similar rights-based terms:

> As we look to the future, it is clear that the efforts to provide equal educational opportunity must now focus much more specifically on education: on assuring that the opportunity is not only equal, but adequate, and that in those remaining cases in which desegregation has not yet been completed it be achieved with a greater sensitivity to educational needs.

118 CONG. REC. 8928 (1972). President Nixon further explained that the proposed legislation would "[r]equire that no State or locality could deny equal educational opportunity to any person on account of race, color, or national origin." *Id.* at 8929.

Even more compelling, the Secretary of Health, Education and Welfare, Elliot Richardson, confirmed before the House Committee on Education and Welfare that the provision, if enacted, would create an individual right—including a right to bilingual education:

> It would be a legal right to receive bilingual education as set forth in the beginning of section 201 [now § 1703] . . . . This would be the first time that Congress ever affirmatively declared that there is a right to receive bilingual education. It would mean, therefore, that in the future any refusal to provide it would be a violation of the law.

Equal Educational Opportunities Act: Hearings on H.R. 13915 Before the H. Comm. on Education and Labor, 92d Cong. 140-41 (1972) (testimony of Sec. Richardson).

Thus, in approving the initial legislation, the House Committee confirmed the rights-creating intent of the EEOA:

> [T]he committee bill for the first time in Federal Law contains an illustrative definition of a denial of equal educational opportunity. It is the purpose of that definition . . . to provide school and governmental authorities with a clear definition of their responsibilities to their students and employees and to provide the students and employees with the means to achieve *enforcement of their rights.*

H.R. REP. No. 92-1335, at 3 (1972) (emphasis added). This statement, along with the statements by President Nixon and Secretary Richardson, strongly suggests an intent to create an individual right, both in the initially considered version of the EEOA in 1972 and in the identical version finally enacted two years later.

The timing of its enactment—on the heels of the Supreme Court's decision in *Lau* v. *Nichols*, 414 U.S. 563 (1974)—also suggests that Section 1703 was intended to address individual rights. In *Lau*, the Court addressed whether the City of San Francisco's failure to provide a group of Chinese students supplemental instruction in English violated Title VI of the Civil Rights Act of 1964 (and certain HEW regulations promulgated thereunder). The Court found that the City's failure to address the language deficiency of these students violated federal law. *Id.* at 567-69. However,

four justices concurred only in the judgment, finding only a violation of the HEW regulations governing the instruction of non- and limited-English students. *See id.* at 570 (White, J., concurring). This left unclear whether ELL students had a federal right to a "meaningful opportunity to participate" in the educational program under Title VI absent the HEW regulations.

Four months following *Lau*, Congress passed the EEOA, including Section 1703(f). Congress was aware of the *Lau* decision and referred to it in the legislative history of the Bilingual Education Act, which was passed simultaneously with the EEOA in 1974.[8] Congress thus acted to clarify the uncertainty left by *Lau*, a conclusion drawn by lower courts in addressing the meaning of Section 1703(f). *See, e.g.*, *Castañeda* v. *Pickard*, 648 F.2d 989, 1008 (5th Cir. 1981); *Cintron* v. *Brentwood Union Free Sch. Dist.*, 455 F. Supp. 57, 61 (E.D.N.Y. 1978) ("Apparently spurred by the Court's pronouncement in *Lau*, the Congress explicated the obligation of the state to provide an effective bilingual educational program in the enactment of [Section 1703(f)]."). Thus, the EEOA sought to establish firmly in statutory law the individual right to equal educational opportunity partially embraced in *Lau*.

---

[8] *See* 120 CONG. REC. 15,430 (1974) (describing the holding of *Lau* and resolving "to assist in the provision of *equal educational opportunity*") (emphasis added).

B. The Flexible "Appropriate Action" Standard in Section 1703(f) Confers on State and Local Educational Agencies the Discretion to Effectuate This Right Through Bilingual Education Where Appropriate

At the same time that Section 1703(f) creates an individual right to equal educational opportunity for ELL students, it creates a balance between the right created and the discretion of States and localities to choose how best to effect that right for its ELL students.

The clearest indicator of Congress' intent to leave the implementation of Section 1703(f) to States and localities (subject to judicial review) is its choice of broad language in the statute itself. In employing the phrase "appropriate action," Congress clearly envisioned that States and localities could consider a wide range of alternatives in their efforts to effect the right to equal educational opportunity. Congress thus struck a delicate balance of protecting individuals' rights while preserving some degree of discretion in an area traditionally governed by States and localities. [9]

The Fifth Circuit aptly described this balance in *Castañeda*, the definitive case to date on the construction of Section 1703(f). In *Castañeda*, the court,

---

[9] One of our Constitution's primary authors—James Madison—warned that the federal government should tread lightly in dealing with education, a traditional responsibility of the States. *See* Annals of Cong. 388, 389 (1849) (federal funding and control of schools "would subvert the very foundations . . . of the limited Government established by the people of America").

in construing "appropriate action," concluded that Congress utilized intentionally broad language to permit States and localities significant flexibility in choosing the approach toward ensuring the rights of students under the EEOA:

> We think Congress' use of the less specific term, "appropriate action," rather than "bilingual education," indicates that Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations under the EEOA.

Castañeda, 648 F.2d at 1009. At the same time, however, it also recognized that the discretion conferred by Section 1703(f) was not boundless, and that State and local programming would be subject to some degree of judicial scrutiny:

> [B]y including an obligation to address the problem of language barriers in the EEOA and granting limited English speaking students a private right of action to enforce that obligation in § 1706, Congress must also have intended to insure that schools made a genuine and good faith effort, consistent with local circumstances and resources, to remedy the language deficiencies of their students and deliberately placed on federal courts the difficult responsibility of determining whether that obligation had been met.

Id. In other words, Section 1703(f), as *Castañeda* instructs, struck a balance by granting a judicially enforceable right

on the one hand and, on the other, deferring to State and local entities on the implementation of that right.

This balance is aptly captured in the three-pronged test established in *Castañeda* to determine whether a State or locality has taken "appropriate action" to provide equal educational opportunity to its ELL students. Under that test, whether a State has taken appropriate action is determined by an examination of three broad factors: (1) "the soundness of the educational theory or principles upon which the challenged program is based"; (2) "whether the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school"; and (3) whether the program "produce[s] results indicating that the language barriers confronting students are actually being overcome." *Id.* at 1010. The flexibility of this test achieves Congress' objective of leaving significant discretion to States and localities as to what "appropriate action" to take under Section 1703(f).

Moreover, Congress clearly contemplated that the discretion left to States under Section 1703(f) was broad enough to permit the use of bilingual education as one of any number of "appropriate action[s]" to ensure the rights of English-deficient students. As the Fifth Circuit recognized in *Castañeda*, Section 1703(f) was enacted at the same time as the Bilingual Educational Act of 1974, Pub. L. No. 93-380, 88 Stat. 503, 512 (1974), which established a program of federal financial assistance to encourage local educational authorities to develop and implement bilingual education programs. *Castañeda*, 648 F.2d at 1008-09. Moreover, while Congress did not

intend Section 1703(f) "to *require* local educational authorities to adopt any particular type of language remediation program," *id.* at 1008 (emphasis added), it clearly did not intend to *preclude* use of some form of bilingual education as a means of ensuring the right, *id.* at 1008-09. Thus, when Congress, through its flexible "appropriate action" standard, sought to contain the expansion of federal power inherent in a judicially enforceable right to equal educational opportunity for ELL students, it did so with a clear recognition that providing some version of bilingual education could, under "appropriate" circumstances, constitute "appropriate action."[10]

Thus, the structure, legislative history, and judicial context to Section 1703(f) all demonstrate that Congress intended (1) to create for ELL students an individual right to "equal educational opportunity," and (2) to preserve for the States significant discretion in how to effectuate that right under a broad "appropriate action" standard. Given this expressed intent, any subsequent attempt to alter the right created or the balance struck by Congress must be done clearly and unambiguously. Title III evidences no such intent, in either respect.

---

[10] Secretary Richardson's testimony before the House Committee in 1972 similarly confirms that States could use bilingual education as a means to provide equal educational opportunity to ELL students. *See Equal Educational Opportunities Act: Hearings on H.R. 13915 Before the H. Comm. on Education and Labor*, 92d Cong. 140-41 (1972) (testimony of Sec. Richardson).

III. Title III Was Never Intended to Alter Either the Right Created or the Federalism Balance Struck by Section 1703(f)

Petitioners and certain *Amici* argue, in essence, that Title III of NCLB renders Section 1703(f), as construed by *Castañeda*, a dead letter. *See, e.g.*, Pet'r Horne Br. 1; Pet'rs Arizona House Spkr. and Senate Pres. Br. 51-55. In support, they argue that satisfaction of the requirements set forth in Title III necessarily constitutes "appropriate action" sufficient to ensure ELL students' right to equal educational opportunity. *See id.* But Title III does not evidence a clear and unequivocal intent by Congress either to alter the right created by Section 1703(f) or to disrupt the federalism balance created by it. In the absence of a clear direction by Congress to change the earlier statute, its well-established interpretation continues to govern.

A. Title III Cannot Alter the Statutory Right Created by Section 1703(f) Absent Clear Congressional Intent

"Repeals by implication are not favored . . . . In the absence of some affirmative showing of an intent to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton* v. *Mancari*, 417 U.S. 535, 549-50 (1974) (citations and internal quotation marks omitted). In Title III, we find no evidence of intent to affect the statutory right to equal educational opportunity as defined by Section 1703(f). First, there is no explicit rights-affecting language directed at the statutory right to equal educational opportunity set

forth in Section 1703(f). Quite the opposite—in enacting NCLB, Congress also enacted 20 U.S.C. § 6847, which states: "Nothing in this part shall be construed in a manner inconsistent with any Federal law guaranteeing a civil right." 20 U.S.C. § 6847. A clearer statement of Congress' intent to preserve the scope of Section 1703(f) could hardly be crafted.

Rather than evidencing an intent by Congress to affect individual rights, Title III evidences an intent to create a system of accountability for receipt of federal funds. It is voluntary in nature (*i.e.*, States can opt out and forego federal funding), and contains no private right of action. In particular, under Title III, States with federal government-approved plans are granted funds to further this purpose. *See* 20 U.S.C. §§ 6821-6826. Ongoing eligibility for funds is based upon "annual measurable achievement objectives . . . includ[ing] . . . making adequate yearly progress for limited English proficient children." *See* 20 U.S.C. § 6842. This includes "at a minimum, annual increases in the number or percentage of children making progress in learning English," "at a minimum, annual increases in the number or percentage of children attaining English proficiency by the end of each school year," and "making adequate yearly progress" in the academic achievement of such children. 20 U.S.C. § 6842(a)(3)(A).[11]

---

[11] Perhaps recognizing that Title III is, at its core, a funding statute designed to further federal educational policies on a broad scale, rather than a vehicle to bear and enforce individual civil rights, neither Title III nor NCLB contains any private right of action, an interpretation which has been borne out by

(Cont'd)

Simply put, where Section 1703(f) sounds in individual rights, Title III sounds in regulatory accountability. To read Title III as affecting in any way the right created by Section 1703(f) would do violence to the clear intent of both statutes.

B. Title III Does Not Evidence Clear Congressional Intent to Disrupt Section 1703(f)'s Balance of Federalism Considerations

By the same token, Title III does not evidence the kind of clear intent necessary to change the balance struck by the "appropriate action" requirement of Section 1703(f). In striking this balance, Congress contemplated that a State would be permitted to use bilingual education as a form of "appropriate action" to provide equal educational opportunities to its ELL students. Petitioners' reading of Title III as supplanting *Castañeda's* three-part test for "appropriate action" under Section 1703(f) would reduce that discretion and, as a practical matter, limit the use of bilingual education. Title III does not show the clear intent needed to limit state discretion in complying with the earlier statute.

It is well-settled that congressional attempts to repeal or modify federalism protections must be clear and unambiguous. *See Will* v. *Mich. Dep't of State Police*,

---

(Cont'd)

ample case law. *See, e.g., Fresh Start Acad.* v. *Toledo Bd. of Educ.*, 363 F. Supp. 2d 910 (N.D. Ohio 2005); *ACORN* v. *NYC Dep't of Educ.*, 269 F. Supp. 2d 338 (S.D.N.Y. 2003); *Stokes exrel. K.F.* v. *U.S. Dep't of Educ.*, 05-11764-RWZ, 2006 WL 1892242 (D. Mass. July 10, 2006); *Coachella Valley Unified Sch. Dist.* v. *California*, C 05-02657 WHA, 2005 WL 1869499 (N.D. Cal. Aug. 5, 2005).

491 U.S. 58, 65 (1989); *see also Gregory* v. *Ashcroft*, 501 U.S. 452, 460-61 (1991) (concluding that a congressional intent "to alter the usual constitutional balance between the States and the Federal Government" must be "unmistakably clear in the language of the statute") (internal quotations omitted) (citations omitted). Thus, where statutes have posed threats to a pre-existing balance of federal and state authority, this Court has required that Congress manifest a clear intent to alter it. *See, e.g., Pa. Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 209 (1998) (addressing whether the ADA applies to state prisons); *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (addressing whether the Bankruptcy Code displaced state laws relating to title in real estate); *Gregory*, 501 U.S. at 456, 461 (addressing whether the ADEA applies to state law establishing mandatory retirement age for Missouri judges).

This principle applies with particular force where Congress legislates in the area of public education, an area traditionally within the province of State regulation. *See, e.g., United States* v. *Lopez*, 514 U.S. 549, 580-81 (1995) (stating that education is considered to be an area of traditional State regulation); *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 58 (1973) ("The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States, and we do no violence to the values of federalism and separation of powers by staying our hand."); *Wisconsin* v. *Yoder*, 406 U.S. 205, 213 (1972) ("Providing public schools ranks at the very apex of the function of a State."); *Epperson* v. *Arkansas*, 393 U.S. 97, 104, (1968); *Brown* v. *Bd. of Educ. of Topeka*, 347 U.S. 483,

493 (1954) ("[E]ducation is perhaps the most important function of state and local governments."). Thus, where an interpretation of a statute would effect an "alteration of the existing allocation of responsibilities between States and the National Government in the operation of the Nation's schools," this Court will not adopt such an interpretation "unless that is the manifest purpose of the legislation." *Owasso Indep. Sch. Dist. No. I-011* v. *Falvo*, 534 U.S. 426, 432 (2002).

Title III does not display a manifest intent to redefine the contours of "appropriate action" under Section 1703(f). To begin with, there is no mention whatsoever of Section 1703(f) in Title III, or elsewhere in NCLB. Moreover, one of the stated purposes of Title III is "to provide State educational agencies and local educational agencies with the flexibility to implement language instruction educational programs, based on scientifically based research on teaching limited English proficient children, that the agencies believe to be the most effective for teaching children." 20 U.S.C. § 6812(9). Thus, one purpose of Title III—to promote flexibility in States' teaching ELL students—is entirely consonant with the purpose and federalist spirit of Section 1703(f)'s flexible "appropriate action" standard.

True, in enacting Title III, Congress imposed a number of conditions that create practical limitations on States' use of bilingual education as a condition of receiving Title III funding. For example, Title III mandates that States set "annual measurement achievement objectives" for ELL students that include annual increases in the number or percentage of ELL students making progress in learning English, 20 U.S.C.

§ 6842(a)(1), and annual increases in the percentage of ELL students becoming proficient in English, *id.* at § 6842 (a)(3)(A)(i).[12]

Such limitations are entirely appropriate under this Court's Spending Clause jurisprudence. *See, e.g, South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987). However, extending Title III to redefine what constitutes "appropriate action" under Section 1703(f) would effect a radical shift in the balance struck in that statute, and would do so without congressional authorization.

At best, Title III imposes English acquisition requirements as a condition of federal funding, not as a means of complying with § 1703(f). *See* 20 U.S.C. §§ 6821-6826, 6842. Compliance with Title III, therefore, means only that a State has to meet the precondition to receive federal funding, not that it has automatically remediated language barriers as required by Section 1703(f). While compliance with Title III may have some value in determining whether "appropriate action" has been rendered sufficient to remedy a violation of Section 1703(f), *see, e.g., Flores*, 516 F.3d at 1175 n.46, compliance with Title III alone is not *per se* "appropriate action" under Section 1703(f). To hold differently would be to undermine the federalism concerns underlying that statute.

---

[12] These objectives are subject to the approval of the Secretary of Education. 20 U.S.C. § 6823(c). Title III also imposes sanctions upon States and localities for failure to meet these English acquisition standards, such as mandated modifications of educational programming, replacement of school personnel, and outright denial of federal funds. 20 U.S.C. § 6842(b)(4).

CONCLUSION

For the reasons explained above, the Court should affirm the judgment and order below.

Respectfully submitted,

PATRICK F. LINEHAN
Counsel of Record
JAMES L. STUART
ANGELA L. LIPSCOMB
ANTHONY J. RAPA
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000

Attorneys for Amici Curiae

AMICUS CURIAE BRIEF

121

(14) (16)

Nos. 08-289 & 08-294

Supreme Court, U.S.
FILED
FEB 26 2009
OFFICE OF THE CLERK

In the Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF ARIZONA, PETITIONER

v.

MIRIAM FLORES, *ET AL.*, RESPONDENTS

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES AND PRESIDENT OF THE ARIZONA SENATE, PETITIONERS

v.

MIRIAM FLORES, *ET AL.*, RESPONDENTS

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

DANIEL J. POPEO
RICHARD A. SAMP
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

GENE C. SCHAERR
Counsel of Record
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006
(202) 282-5000

PROF. ROSS SANDLER
PROF. DAVID SCHOENBROD
New York Law School
57 Worth Street
New York, NY
(212) 431-2100

MICHAEL J. FRIEDMAN
ARI E. WALDMAN
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166
(212) 294-6700

Counsel for Amicus Curiae

BOTH 4CVTRN

QUESTIONS PRESENTED

1. Whether a federal-court injunction seeking to compel institutional reform should be modified in the public interest when the original judgment could not have been issued on the state of facts and law that now exist, even if the named defendants support the injunction.

2. Whether compliance with NCLB's extensive requirements for English-language instruction is sufficient to satisfy the EEOA's mandate that States take "appropriate action" to overcome language barriers impeding students' access to equal educational opportunities.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES ii

INTRODUCTION AND INTERESTS OF AMICUS CURIAE 1

STATEMENT 2

SUMMARY OF ARGUMENT 9

ARGUMENT 10

THE NINTH CIRCUIT ERRED IN CONSIDERING ARIZONA'S FAILURE TO APPEAL THE DECLARATORY JUDGMENT AS A FACTOR WEIGHING AGAINST RELIEF UNDER RULE 60(B)(5) 10

A. Linking Rule 60(b)(5) Relief To A Public Defendant's Prior Litigation Tactics Inappropriately Extends The Lawmaking Authority Of Past Office Holders Beyond Its Constitutional Limits 10

B. Litigation Tactics of Past Administrations Should Be Given Minimal Weight Because State Office Holders Often Achieve Personal Political Objectives By Acquiescing 15

C. Arizona's Failure To Appeal The Declaratory Judgment Should Have Been Disregarded In Assessing Petitioners' Rule 60(b)(5) Motion 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES:

Allen v. *McCurry*,
449 U.S. 90 (1980) 17

Benjamin v. *Malcolm*,
No. 75 Civ. 3077
(S.D.N.Y. filed Sept. 19, 1980) 16

Connecticut Mutual Life Insurance Co. v. *Spratley*,
172 U.S. 602 (1898) 11

Dunn v. *Carey*,
808 F.2d 555 (7th Cir. 1986) 16-17

Frew v. *Hawkins*,
540 U.S. 431 (2004) 12

Missouri v. *Jenkins*,
515 U.S. 70 (1995)
(Thomas, J., Concurring) 11

Newton v. *Commissioners*,
100 U.S. 548 (1879) 11

Ohio Life Insurance and Trust Co. v. *Debolt*,
57 U.S. (16 How.) 416 (1853) 10

Reichelderfer v. *Quinn*,
287 U.S. 315 (1932) 11

Rufo v. *Inmates of Suffolk County Jail*,
502 U.S. 367 (1992) 1-2, 5-7, 9, 20

Stone v. *Mississippi*,
101 U.S. 814 (1880) 11

U.S. Trust Co. v. *New Jersey*,
431 U.S. 1 (1977)
(Brennan, J., *dissenting*) 2

STATUTES AND RULES:

20 U.S.C. § 1703(f) 3

Fed. R. Civ. P. Rule 60(b)(5) 1-2, 5, 7-10, 15, 18-20

OTHER AUTHORITIES

1 William Blackstone, Commentaries 12

Robert E. Buckholz, et al., "The Remedial
Process in Institutional Reform Litigation,"
78 Colum. L. Rev. 784 (1978) 16

Frank H. Easterbrook, "Justice and Contract
in Consent Judgments",
1987 U. Chi. Legal F. 19 (1987) 14

Martin H. Redish, *Money Talks*
(New York Univ. Press) (2001) 13

Ross Sandler & David Schoenbrod,
*Democracy By Decree: What Happens When
Courts Run Government*
(Yale University Press) (2003) 16

Ross Sandler & David Schoenbrod,
"From Status to Contract and Back Again:
Consent Decrees in Institutional Reform
Litigation," 27 Rev. of Litig. (2007) 14

INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*[1]

Rule 60(b)(5) expressly permits a district court to relieve a party from a judgment or decree where "applying it prospectively is no longer equitable." This Court held in *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 393 (1992) that requests for relief under Rule 60(b)(5) should be evaluated under a "flexible standard" and should be granted where a movant can show that "a significant change in facts or law warrants revision of the decree."

The decisions below misapplied Rule 60(b)(5) and *Rufo* in giving undue weight to the fact that prior State administrations had not appealed the earlier rulings supporting the decrees at issue. Specifically, the Ninth Circuit found that the State's failure to appeal a January 2000 declaratory judgment that its funding earmarked for English Language Learners (ELL) instruction was inadequate foreclosed any inquiry, in 2008, into whether the State's general increases in non-earmarked education funding since 2000 warranted revision of that judgment. Rather than considering whether Petitioners' proffered changed facts were sufficient to warrant modification under Rule 60(b)(5) and *Rufo*, the Ninth Circuit held that even *considering* those facts would "reopen matters made final when the Declaratory Judgment was not appealed." Pet. App. 68a. As a result, the Ninth

---

[1] The parties have consented to the filing of this brief. Letters of consent have been lodged with the Court. In accordance with Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel has made a monetary contribution to the preparation or submission of this brief.

Circuit's reliance on the State's failure to appeal earlier rulings as a factor weighing against modification deprived Arizona's current policy makers of the full opportunity for relief promised by Rule 60(b)(5) and *Rufo*.

This Court's ruling in *Rufo* struck a delicate balance between the interests of the federal judiciary in enforcing federal laws and the interests of State voters in enacting their own budgetary priorities. The Ninth Circuit's undue emphasis on missed appeal dates upsets that balance, and in this case inappropriately tilts the scale against the rights of Arizona's voters.

That outcome is of particular concern to the Washington Legal Foundation ("WLF"), a national nonprofit public interest law and policy center dedicated to, among other issues, opposing inappropriate intrusions by the federal judiciary into the operation of state governments. WLF strongly opposes the Ninth Circuit's attempt to tilt the scales against the duly enacted budgetary decisions of Arizona's voters. And it urges not only reversal of the decision below, but also clarification of the *Rufo* standard so that "each generation of representatives can and will remain responsive to the needs and desires of those whom they represent." *U.S. Trust Co.* v. *New Jersey*, 431 U.S. 1, 45 (1977) (Brennan, J., *dissenting*).

STATEMENT

This case was originally filed in 1992. The plaintiffs, parents of ELL children in Nogales, Arizona, alleged that the State of Arizona had failed to "take appropriate action to overcome language barriers that impede equal participation" of their children in Arizona's instructional programs, in violation of the fed-

eral Equal Education Opportunity Act of 1974 (EEOA), 20 U.S.C. § 1703(f).

The plaintiffs alleged numerous specific defects in Arizona's ELL education programs, and the State eventually agreed to (and did) remedy most of them. Agreement was not reached on the question of whether Arizona adequately funded the ELL programs in plaintiffs' school district, and a bench trial was held on that subject in August 1999.

Following that trial, on January 24, 2000, the district court issued a declaratory judgment finding numerous deficiencies in the ELL program in plaintiffs' district, including:

> 1) too many students in a class room,
>
> 2) not enough class rooms,
>
> 3) not enough qualified teachers, including English as a Second Language ("ESL") teachers and bilingual teachers to teach content area studies,
>
> 4) not enough teacher aids,
>
> 5) an inadequate tutoring program, and
>
> 6) insufficient teaching materials for both ESL classes and content area courses.

Pet. App. 149a-150a.

The district court attributed these defects to inadequate funding. The court noted that the programs at issue were "financed by a combination of revenues from local, county, state and federal sources," including (1) the State's "base level" funding per student (the amount paid by the State for every student in the State, regardless of language skills); (2) the State's "Group B" funding per student (the amount paid by the State in addition to base level funding for

certain specific types of student, including for ELL students); (3) federal grants; (4) regular district and county taxes; and (5) special voter-approved district and county taxes called "overrides." Pet. App. 121a-146a.

While significant increases in any of these five sources of revenue would undoubtedly alleviate the above deficiencies, the district court focused only on the second – Arizona's incremental "Group B" funding per ELL student – because the federal law at issue, the EEOA, only addressed the *State's* obligations to "take appropriate action to overcome language barriers." The district court concluded that the State's Group B funding was inadequate to satisfy its obligations under the EEOA. Pet. App. 150a.

The State, represented at the time by Attorney General Janet Napolitano, did not appeal the Declaratory Judgment.

Following the declaratory judgment, *all* of the numerous sources of funding for ELL education identified by the district court were increased. Some of that increase was the result of the federal No Child Left Behind Act, which included an entire title on ELL education and provided additional funds for it. The voters in plaintiffs' district approved overrides adding additional funds. And the State substantially increased both its base level funding and its Group B funding. The net result of those increases was that the total spending from all sources per ELL student rose from $3,302 in 2000 to $4,605 in 2007 – a 39% increase.

One of those spending increases came in the form of a State law called HB 2064, which provided for increased Group B funding as well as two additional

supplemental state-wide funds for "structured English immersion" and for "compensatory instruction" which school districts could access in certain circumstances.

Governor Janet Napolitano thought HB 2064 did not go far enough to improve Arizona's ELL programs. She nevertheless allowed the bill to become law because she thought her agenda would fare better in a courthouse than it was faring in the statehouse: "After nine months of meetings and three vetoes, it is time to take this matter to a federal judge." The Governor issued a statement to accompany the bill, saying she believed that it: (1) set an arbitrary level of ELL funding; (2) failed to ensure academic accountability; (3) failed to ensure program effectiveness; (4) created new bureaucracy and excess paperwork; and (5) violated federal laws. Pet. App. 27a-28a.

The Governor then directed the Attorney General to move the district court, on behalf of the State, for expedited consideration of the law. The principal defendant in the case, the State of Arizona, was thus pushing for the *continuation* of the declaratory judgment requiring additional ELL funding. It was left to the State schools superintendent and the Legislature's majority leaders, the Petitioners here, to intervene to oppose continued federal court involvement, which they did in the form of a motion for relief from judgment under Rule 60(b)(5).

Citing *Rufo*, the Petitioners urged that significant changes in both facts and law warranted revision of the district court's earlier rulings commanding increased Group B funding. Specifically, the Petitioners pointed to significant increases in overall school

funding, improved management, and improved test scores as proof that Arizona was now taking "appropriate action to overcome language barriers" as required by the EEOA. The Petitioners did *not* argue that they had complied with the earlier orders specifically directing increased Group B funding, but rather argued that the conditions those earlier orders were intended to rectify had been remedied through other means, so that the continuation of those orders was no longer equitable.[2]

In January 2007, the district court held an evidentiary hearing to evaluate the current conditions on the ground. Despite the Petitioners making clear that they were seeking modification based on changed facts and not a finding of compliance, the district court considered only whether the State had complied with the earlier injunctions requiring increased Group B funding. The district court did not consider whether the earlier injunctions should be modified based on a significant change in fact or law under *Rufo*. Pet. App. 111a. The district court found that its earlier injunctions had not been satisfied and renewed its command to satisfy those earlier decrees by the end of the current legislative session.

On appeal, the Ninth Circuit acknowledged that Arizona had "significantly improved its ELL infrastructure." The court noted that the State had (1) increased overall school funding; (2) improved and standardized its ELL training and proficiency stan-

---

[2] The Petitioners also pointed out that the law had changed, in that the ELL funding mandates specified by Congress in the No Child Left Behind Act of 2001 had supplanted the EEOA's more general funding requirements. While *amicus* also supports those arguments, they are not the subject of this brief.

dards; (3) ensured that all teachers, supervisors, principals and superintendents are ELL certified, and in plaintiffs' district; (4) reduced class sizes; (5) improved teacher quality; (6) made teaching materials more available; (7) increased performance monitoring; and, most important,(8) helped graduates of the ELL program to perform as well as their native English speaking peers. Pet. App. 30a-41a. The Ninth Circuit noted that these improvements were made possible by the 39% increase in the total spending from all sources for each ELL student in plaintiffs' district discussed above. Pet. App. 44a.

But the Ninth Circuit refused to find any of these improvements to be "changed facts" sufficient to justify relief from the earlier orders under Rule 60(b)(5) and *Rufo*, because the Group B funding component of the 39% total spending increase had only increased from $156 to $444 per student. The Ninth Circuit concluded that the modest increase in this subcategory was evidence that the State was poaching funds from non-ELL students in order to meet its obligations to ELL students. The Ninth Circuit wrote that the declaratory judgment had specifically disapproved of such poaching, and that the Petitioners, having failed to appeal that particular ruling in 2000, could not revisit that ruling now. Pet. App. 66a-70a.

> If the [Petitioners] believed that the district court erred and should have looked at all funding sources differently in its EEOA inquiry, they should have appealed the Declaratory Judgment. They may not now up-end its basic legal conclusions.

Pet. App. 69a.

The Ninth Circuit emphasized throughout its opinion that even *considering* the issues raised by the Petitioners in their Rule 60(b)(5) motion would mean reopening issues that could not be reopened because they were not timely appealed. *See, e.g.*, Pet. App. 59a ("This case is unusual in that the [Petitioners] (1) *did not appeal* from the original judgment holding that Arizona's funding system for ELL programs was in violation of the EEOC; [and] (2) *did not appeal* from the injunctions issued to remedy that violation") (emphasis added); Pet. App. 60a ("nor do we think it proper to reward Arizona's foot-dragging by granting relief from judgment on grounds that *could have been raised on appeal* from the Declaratory Judgment and from earlier injunctive orders but were not") (emphasis added); Pet. App. 62a ("The judgment determined that the state has not provided adequate resources to support [Nogales Unified School District's (") NUSD's(")] ELL programming, as required by the EEOA. We cannot now decide anew the *unappealed* Declaratory Judgment, nor the many post-judgment orders so holding. As we have explained, the provisions of Rule 60(b) may not be applied to 'derogate from the purpose and effect of Rule 4(a).' *In re Stein*, 197 F.3d at 425. The legal determinations made in the Declaratory Judgment were *unappealed* and are now final") (emphasis added); Pet. App. 68a (By arguing that focusing on earmarked funding is no longer appropriate due to general increases in non-earmarked funding, "the Superintendent and Legislative Intervenors seek to reopen matters made final when the Declaratory Judgment was *not appealed*") (emphasis added); Pet. App. 69a ("If the [Petitioners] believed that the district court erred and should have looked at all funding sources differently in its EEOA inquiry, they *should have appealed* the Declaratory

Judgment. They may not now up-end its basic legal conclusions") (emphasis added); Pet. App. 70a (The district court in 2000 refused to view forcing school districts to dip into base level funds to fund ELL programs as an option. "That binding legal determination is *not now subject to reconsideration*") (emphasis added); Pet. App. 70a ("The district court understood EEOA compliance to be a state obligation and so ruled. * * * That *unappealed* determination still stands") (emphasis added).

By deeming Arizona's failure to appeal the declaratory judgment as a significant – indeed determinative – factor weighing against relief under Rule 60(b)(5), the Ninth Circuit departed from the framework set forth by this Court in *Rufo*. As explained below, this change, if followed nationally, would cripple efforts by future policy makers to find new ways to improve upon the policy decisions of their predecessors, and would thus mark a sea change in the permanence of federal judicial interference in state political processes. It should therefore be reversed.

SUMMARY OF ARGUMENT

The Ninth Circuit's emphasis on Arizona's failure to appeal the declaratory judgment as a factor weighing against relief from that ruling is a dangerous precedent for two related reasons. First, *any* reference to the litigation tactics of previous office holders has the effect of extending the budgetary authority of prior office holders beyond its temporal limits. Second, as exemplified by Governor Napolitano's role here, State officials often *benefit* from institutional reform injunctions requiring their States to divert funding to programs they support, so the assumption that the State's voters were zealously represented

when prior litigation tactics were formulated – and thus already had their chance to make all meritorious arguments against the injunction – is flawed.

It was therefore error for the Ninth Circuit to refuse to consider all of the changed facts proffered by Petitioners, without regard to whether they required revisiting the district court's earlier conclusions. The Ninth Circuit's improper focus on the State's failure to advance Petitioners' arguments sooner had the effect of entrenching the power of prior office holders whose views are not shared by Arizona's voters.

ARGUMENT

THE NINTH CIRCUIT ERRED IN CONSIDERING ARIZONA'S FAILURE TO APPEAL THE DECLARATORY JUDGMENT AS A FACTOR WEIGHING AGAINST RELIEF UNDER RULE 60(B)(5)

A. Linking Rule 60(b)(5) Relief To A Public Defendant's Prior Litigation Tactics Inappropriately Extends The Lawmaking Authority Of Past Office Holders Beyond Its Constitutional Limits

1. This Court has repeatedly held that sitting lawmakers cannot bind their successors. In *Ohio Life Insurance and Trust Co.* v. *Debolt*, 57 U.S. (16 How.) 416, 431 (1853), this Court wrote:

> The powers of sovereignty confided to the legislative body of a state are undoubtedly a trust committed to them, ...; and no one legislature can, by its own act, disarm their successors of any of the powers or rights of sovereignty confided by the people to the legislative body.

Similarly, in *Newton* v. *Commissioners*, 100 U.S. 548 (1879), the Court ruled that the Ohio legislature could move its state capital, notwithstanding decisions by a legislature thirty years earlier as to its location. The Court emphatically declared:

> Every succeeding legislature possesses the same jurisdiction and power ... as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality. ... It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require.

Id. at 559.

The Court has expressed a similar view in many other cases, *E.g.*, *Stone* v. *Mississippi*, 101 U.S. 814, 818 (1880) ("no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police"); *Connecticut Mutual Life Insurance Co.* v. *Spratley*, 172 U.S. 602, 621 (1899) ("[E]ach subsequent legislature has equal power to legislate upon the same subject. The legislature has power at any time to repeal or modify [an] act."); *Reichelderfer* v. *Quinn*, 287 U.S. 315, 318 f(1932) ("the will of a particular Congress which does not impose itself upon those to follow in succeeding years.")

More recently, the Court and its individual Members have applied this principle in the litigation context. In *Missouri* v. *Jenkins*, 515 U.S. 70, 131 (1995), for example, Justice Thomas noted that "[a] structural reform decree eviscerates a State's discretionary authority over its own program and budgets and

forces state officials to reallocate state resources and funds * * * at the expense of other citizens, other government programs, and other institutions not represented in court." (Thomas, J., concurring). And in *Frew* v. *Hawkins*, 540 U.S. 431, 441 (2004), the Court noted that "remedies outlined in consent decrees involving state officeholders may improperly deprive future officials of their designated legislative and executive powers".

The foundation of these holdings is the principle expressed long ago by Blackstone:

> Acts of parliament derogatory from the power of subsequent parliaments bind not. . . . Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been, if it's [sic] ordinances could bind the present parliament.

1 William Blackstone, Commentaries 90.

This principle of equality of power from one generation to the next was woven into the text of the Constitution itself. Numerous provisions address this issue, including:

> (1) presidential term limits (U.S. Const. amend. XXII), which enshrines the principle of temporary power;
>
> (2) the guarantee of the power to amend the Constitution (U.S. Const. art. V), which shows the Framers' recognition that future generations could improve upon their work;
>
> (3) the First Amendment's protection of free speech (U.S. Const. amend I), which ensures

that the next generation of political ideas is given a full and fair opportunity to supplant its predecessors, and that no particular viewpoint is entrenched as more normatively "correct" than another. *See* Martin H. Redish, *Money Talks* 48 (New York Univ. Press) (2001) (discussing the principle of "epistemological humility" that underlies the entire concept of free speech protection, and noting that "free speech protection cannot be made to turn on either the regulator's or the judicial reviewer's agreement with the normative positions being expressed, lest free speech protection degenerate into an ideological tool to be used by those in power to suppress those who are not"); and

(4) the rare and selective use of supermajority voting (U.S. Const. art. I, § 3, cl. 6 (Senate's guilty verdict on impeachments); U.S. Const. art. I, § 5, cl. 2 (the expulsion of a member from either house); U.S. Const. art. I, § 7 (both houses overriding a presidential veto); U.S. Const. art. II, § 2, cl. 2 (Senate's ratification of a treaty); U.S. Const. art. V (both houses proposing a constitutional amendment); U.S. Const. amend. XIV, § 3 (to remove disability from congressional service of those who participated in insurrection); U.S. Const. amend. XXV, § 4 (determination of presidential disability)), which implies that all other acts of Congress are to be passed by simple majority vote, enabling their repeal by simple majority vote as well.

Each of these provisions makes clear the founders' commitment to keeping the channels of political in-

novation clear of any interference from past office holders.

2. If one administration or legislative session cannot bind the next by its legislative acts, there is no reason why they should be able to do the same by acquiescing – either by consent or by failure to appeal – to a judicial decree. As Judge Easterbrook observed in the context of consent decrees:

> Tomorrow's officeholder may conclude that today's is wrong, and there is no reason why embedding the regulation in a consent decree should immunize it from reexamination when embedding it in C.F.R. does not.

Frank H. Easterbrook, "Justice and Contract in Consent Judgments", 1987 U. Chi. Legal F. 19, 40 (1987).

The same reasoning applies equally to a State's failure to appeal or failure to raise certain arguments in the course of a lawsuit. If an office holder in charge of the State's litigation strategy decides to forego a certain argument – either because she feels it was without merit or, as discussed in the next section, for other reasons – that litigation decision should be no more binding upon successor administrations than would the same office holder's legislative or regulatory efforts. An office holder does not get a "boost" in her lawmaking powers by virtue of getting sued. To preserve the principle of equality between yesterday's leaders and today's, the litigation decisions of the former must not estop the latter from taking contrary views.[3]

---

[3] The appropriate doctrinal category for analyzing the judicial management of institutional reform decrees is the law of equitable remedies, not the law of contract. See discussion of the dis-

This is not to suggest that future administrations may simply ignore binding judicial decrees entered against their predecessors. But where, as here, a decree is premised upon the acquiescence of a predecessor administration, and a successor moves for relief from that decree under Rule 60(b)(5), the acquiescence of the predecessor administration to the decree should not be used as an independent basis for denying relief.

B. Litigation Tactics of Past Administrations Should Be Given Minimal Weight Because State Office Holders Often Achieve Personal Political Objectives By Acquiescing

That general principle finds powerful support in more practical concerns. For one thing, institutional reform injunctions – judicial decrees mandating the funding of government institutions – insulate the institutions they cover from being forced to compete for limited public dollars with other spending programs. And they allow the office holders favoring the covered institutions to bypass the often unsuccessful and always painstakingly slow process of legislative compromise with other elected officials seeking to use the same funds for their own competing priorities.

A court order mandating funding of a particular institution is thus a big "win" for the office holders supporting it – they get the results they wanted without the customary effort and delay and without having to give up anything in return to their political

---

tinction and the implications of that distinction in Sandler & Schoenbrod, "From Status to Contract and Back Again: Consent Decrees in Institutional Reform Litigation," 27 *Rev. of Litig.* 115 (2007).

adversaries. They can portray themselves as having accomplished what they promised without getting bogged down in legislative gridlock, and can leverage that success to win higher office, leaving to successor officials the problem of budget shortfalls in competing programs. See Ross Sandler and David Schoenbrod, *Democracy By Decree: What Happens When Courts Run Government* (Yale University Press) (2003), at 169-70.

This strong potential for conflicts of interest in formulating litigation tactics has not gone unnoticed in the lower courts. In *Benjamin* v. *Malcolm*, No. 75 Civ. 3077 (S.D.N.Y. filed Sept. 19, 1980), a long-running suit in the federal district court against New York City and its Department of Corrections seeking improvement of substandard conditions in the city jails, a defendant prison official openly advocated at trial the increased funding sought by the plaintiffs but opposed by the City, his co-defendant. In response to what he viewed as the absurdity of the resulting examination by the City's lawyer of his own client, the trial judge observed, as follows:

> Sometimes I really wonder . . . whether the defendants themselves shouldn't be represented by separate counsel, about whether there is a conflict of interest between the Commissioner of Corrections, for example, and the Mayor of the City, and I don't know in this particular line of questioning who you represent.

Quoted in Robert E. Buckholz, et al., "The Remedial Process in Institutional Reform Litigation," 78 Colum. L. Rev. 784, 904 n.199 (1978).

A similar situation was presented in *Dunn* v. *Carey*, 808 F.2d 555 (7th Cir. 1986), in which county

jail inmates in Muncie, Indiana had sued county officials for providing allegedly inadequate jail facilities. The officials capitulated and signed a consent decree by which they promised to construct a new jail, police and city hall complex, to be financed through new taxes. The Seventh Circuit sustained a collateral challenge to the decree:

> A court must be alert to the possibility that the consent decree is a ploy in some other struggle. Perhaps the defendants have been frustrated by their inability to win political approval for the construction of a new city hall for Muncie. The federal litigation may have offered an opportunity to achieve other goals, and the "consent" to build a whole governmental complex may have been what defendants received in exchange for giving plaintiffs what they wanted.

Id. at 560.

These cases illustrate that the assumptions that justify the application of estoppel rules to bind a *private* litigant to his prior litigation positions – that the litigant already had his day in court – may not be present when a *public* litigant is involved. When a State office holder is given the chance to "defend" a case in which he can win his personal political objectives by losing the case, and he fails to mount a complete defense, it cannot truthfully be said that the State he represents had a "full and fair opportunity" to litigate the issues he conceded. In these circumstances, estoppel should not apply. *See Allen* v. *McCurry*, 449 U.S. 90, 95 (1980) ("estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case").

This is not to suggest that an office holder who supports an injunction against her polity is necessarily disloyal to her constituents or self-dealing. She may think that she is serving their best interests and is using every tool at her disposal to accomplish what she promised on election day. The point is that she has a strong incentive to forego arguments that a successor with different political views may think are important. The principle, discussed above, of equality among generations of office holders dictates that the successor should be given an opportunity to make the arguments her predecessor chose to forego.

C. Arizona's Failure To Appeal The Declaratory Judgment Should Have Been Disregarded In Assessing Petitioners' Rule 60(b)(5) Motion

These considerations strongly support the conclusion that Arizona's previous failure to appeal the declaratory judgment should have been disregarded in assessing Petitioner's Rule 60 motion, and that the Ninth Circuit's contrary conclusion improperly elevates the litigation tactics of bygone office holders over the decisions of Arizona's current voters.

As previously noted, in the 2000 declaratory judgment and in subsequent enforcement orders, the district court directed the State to provide sufficient Group B funding to bring its ELL program into compliance with the EEOA. The State did not provide the Group B funding the district court wanted, but, seven years later, Petitioners nevertheless sought modification of the Declaratory Judgment under Rule 60(b)(5) on the grounds that the State's ELL program had come into compliance with the EEOA through substantial increases in numerous non-Group B

sources of ELL funding. The Ninth Circuit acknowledged the improvements in the quality of the ELL program as well as the substantial increases in non-Group B funding, but refused to even consider Petitioners' argument that non-Group B sources of funding could satisfy the EEOA, on the grounds that the State had missed its chance to raise that defense by not appealing the declaratory judgment.

In so ruling, the Ninth Circuit entrenched the authority of the Attorney General who in 2000 conceded that only more Group B funding could cure the EEOA violations. That Attorney General, Janet Napolitano, was then elected Governor, and publicly admitted as part of the record in this case that (1) despite representing the State (the principal defendant in this case), she supports the plaintiffs' position that more Group B funding is needed (a conflict of interest which necessitated Petitioners' intervention so that *somebody* in this case would be representing the majority of Arizona's voters); and (2) she prefers resolving this fiscal funding dispute in federal court rather than at the State Capitol ("After nine months of meetings and three vetoes, it is time to take this matter to a federal judge"). Pet. App. 26a.

Entrenching the agenda of a former office holder is thus more than just a theoretical risk in this case; it is an uncontested fact. Governor Napolitano freely admitted that she supports the very declaratory judgment that she was supposed to be zealously opposing, and she further admits that she is seeking to use that declaratory judgment as a trump card to win a budget battle that she has been unable to win through regular legislative channels.

Yet the Ninth Circuit gave Governor Napolitano exactly what she wanted. And it did so by using *Attorney General* Napolitano's failure to appeal the Declaratory Judgment as a factor weighing in favor of *Governor* Napolitano's effort to override the political process.

That was contrary to controlling law. The Rule 60(b)(5) standard set forth by this Court in *Rufo* does not permit consideration of anything more than whether "a significant change in facts or law warrants revision of the decree." 502 U.S. at 393. The Ninth Circuit's refusal to entertain arguments it deemed waived by a former Attorney General not only departed from *Rufo*, but did so in a manner that entrenched the authority of a former Attorney General who has publicly admitted holding views that diverge from those of the voters she supposedly represents—and on the precise issue on which relief is sought.

CONCLUSION

The Ninth Circuit's decision in this case should be reversed and remanded with instructions for the district court to fully consider all changed facts proffered by Petitioners, including the question the Ninth Circuit wrongly deemed waived: whether Arizona's ELL program was sufficiently improved by means of increased non-Group B funding to render prior decrees requiring more Group B funding no longer equitable.

Respectfully submitted.

DANIEL J. POPEO
RICHARD A. SAMP
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

GENE C. SCHAERR
Counsel of Record
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006
(202) 282-5000

PROF. ROSS SANDLER
PROF. DAVID SCHOENBROD
New York Law School
57 Worth Street
New York, NY
(212) 431-2100

MICHAEL J. FRIEDMAN
ARI E. WALDMAN
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166
(212) 294-6700

Counsel for Amicus Curiae

FEBRUARY 2009